

**The Public Commission to Examine the Maritime
Incident of 31 May 2010**

The Turkel Commission

SECOND REPORT

**Israel's Mechanisms for Examining and
Investigating Complaints and Claims of
Violations of the Laws of Armed Conflict
According to International Law**

ANNEX C - THE COMPARATIVE SURVEY

THE QUESTIONNAIRE

ISSUES TO BE ADDRESSED

(Please address each issue separately)

What law / legal principles are applied to the investigation / inquiry of alleged violations of LOAC, in the military and civilian systems? In this regard the Commission would like you to address the following specific questions, supporting your responses with reference to any military regulations, case law (national and international), civilian regulatory guidance, legislation etc. relevant to your country's system.

General

- Please provide a general description of the national system for investigating and prosecuting alleged LOAC violations. In particular, describe whether such cases are handled by the civilian or military justice systems.
- What acts are considered breaches of the LOAC?
- What breaches of LOAC are considered to be war crimes? Is the source of the designation as a “war crime” found in legislation or case law? Please elaborate.
- What acts fall within any such legislation or case law?
- How are breaches of LOAC dealt with when they do not amount to war crimes?

- Is your country party to the International Criminal Court statute? If so, how does that influence the national system of investigation and prosecution regarding alleged LOAC violations?
- Does your country treat human rights law as applicable in armed conflict? If so, on what basis and to what extent?
- Is your country subject to national or regional human rights tribunals or other fora which could investigate alleged LOAC violations (e.g. European Court of Human Rights)? If so, please briefly describe any key cases in that regard.
- What other possibilities are there for investigating possible LOAC violations (e.g. public inquiries, parliamentary hearings, special prosecutors)?
- What is the basis for criminal jurisdiction over breaches of LOAC in your country (territoriality, nationality, passive personality, protective)?
- Does the national war crimes legislation jurisdiction extend to members of the military? If so, under what circumstances?
- Is there universal jurisdiction and how is such jurisdiction exercised?
- Does your country deal with the issue of “command responsibility”? If so, how?
- Does your country deal with the “defense of superior orders”? If so, how?

The Civilian Justice System

- What is the structure of the civilian system of justice and the role of civilian courts, the attorney general or an equivalent prosecution authority and the civilian police in general, and specifically regarding the investigation and prosecution of alleged LOAC violations?
- If there is an attorney general or similar individual in your country, what is his or her role, in particular with regard to incidents that involve possible LOAC issues or possible LOAC violations? Does he/she provide advice on legal matters, supervise subordinate prosecutors, oversee investigative or police personnel? Who has the authority to determine whether or not to prosecute? Is there any other relevant authority?
- Do the civilian investigative authorities, including criminal investigators, act independently or are they subject to the direction of the prosecutor or other actors in the justice system?
- What, if any, safeguards are in place (under law, regulation, policy or practice) to ensure the independence and impartiality of the various actors in the civilian justice system who might be involved in investigating or prosecuting possible LOAC violations? Is there any relevant case law?
- If a matter is subject to a public inquiry and a criminal investigation how is the matter handled (criminal first/concurrent investigation, etc.)?
- Are there specific laws applicable to members of civilian security services? If so, please briefly describe them.

The Military Justice System

- What breaches of LOAC fall under military law?
- What options are available under military law for the investigation of possible LOAC violations (e.g., criminal investigations, boards of inquiry, operational command or unit level investigations)?
- Can civilians be the subject of such investigations?
- Provide a general description of the structure of the military justice system and the role of military courts, prosecution authority (including any military AG/JAG or similar authority) and military police regarding the investigation and prosecution of breaches of LOAC?
- What is the basis for jurisdiction over LOAC breaches under military law (territoriality, nationality, passive personality, protective jurisdiction)?
- Who is subject to military law? Can military jurisdiction be exercised over civilians and if so under what circumstances?
- What disciplinary or punitive actions can be taken when a violation of LOAC is determined to have occurred (e.g., censure, reprimand, discharge from service, imprisonment)?
- Describe the leadership structure of the military legal system. If there is a military attorney general, JAG or equivalent person, what is the role of that individual? Does he/she provide advice to commanders, supervise the military legal system, oversee military justice? What are his/her authority within the military justice system and his/her relationship to military criminal investigators and other investigators?
- To whom does the aforementioned person report? What authority does that superior exercise over him or her?

- What, if any, safeguards are in place (under law, regulation, policy or practice) to ensure the independence and impartiality of the various actors in the military who might be involved in the investigation or prosecution of alleged LOAC violations? Is there any relevant case law?
- Do military investigative authorities act independently or are they subject to the direction of commanders, military legal officers, prosecutors or other actors?
- What is the role of the commander or other senior military personnel with regard to a possible LOAC violation? Is their involvement limited in any way? Do they shoulder any particular responsibilities?
- Is there civilian oversight over the military system and its various actors (e.g. courts, civilian attorney general)?

Application of the Policy in Practice

- If the military and civilian systems both have authority over incidents involving possible LOAC violations, what are the criteria used to determine which system handles the matter? Specifically, explain the interface between civilian and military systems in the investigation and prosecution of alleged breaches of LOAC.
- What are the reporting requirements regarding allegations of wrongdoing (e.g. are allegations reported, to what authority and in what time period)?
- Can complaints of alleged LOAC violations be made directly to the military or the civilian police?
- What is the policy regarding investigation of an alleged LOAC violation by military personnel? Who decides whether an operational inquiry (e.g. by unit military personnel) or criminal investigation is conducted?
- Regarding such investigations, what are the criteria to launch an investigation or other inquiry (e.g. reasonable suspicion, belief that an offence has been committed, etc.)?
- If during an operational investigation or other inquiry by the chain of command it appears that a crime may have been committed, is it required that the matter be referred for criminal investigation? If so, under what circumstances?
- What circumstances in cases involving civilian death or injury or damage to civilian property require that an investigation or inquiry be conducted? Is there a requirement that every death or every civilian death be investigated? Is this a legal requirement or one of policy? Does it extend to cases in which a military objective is attacked and collateral damage or incidental injury occurs?

- What access do affected civilians, including non-citizens and residents of other countries, have to the investigation, its results and any court proceedings?
- What role, if any, do human rights groups have in initiating or conducting any inquiry into alleged LOAC violations?
- Please provide available statistics regarding the investigations or other inquiries and prosecutions of alleged LOAC violations (e.g. numbers of complaints, matters investigated, charges laid, non-judicial action, trials, verdicts – please include civil and military).
- Have any senior military or security service personnel or senior government officials ever been investigated or prosecuted for possible LOAC violations, or for being responsible for such violations (e.g. by ordering, approving, tolerating, ignoring or covering up violations)?
- What examples are available concerning investigations or other inquiries of alleged LOAC violations regarding the following types of incidents (please indicate their outcome).
 1. Theft/assault or alleged mistreatment of civilians (not taking a direct part in hostilities);
 2. Mistreatment of detainees including during interrogation;
 3. Use of force while helping maintain law and order (either directly or in support of police forces) in occupied territories;
 4. Use of force while seeking to arrest or detain a civilian taking a direct part in hostilities;
 5. Use of force at a checkpoint or during a similar operation;

6. Targeting civilians taking a direct part in hostilities;
 7. Use of force against a member of an organized armed group or terrorist organization in the context of an armed conflict;
 8. Use of force against an enemy which resulted in collateral civilian casualties;
 9. Any other relevant case.
- Is there any other information which you would like to bring to the attention of the Commission?

REPORT ON UNITED STATES LAW OF ARMED CONFLICT INVESTIGATIONS AND PROSECUTION PRACTICES

Sean Watts, J.D., LL.M

June 2011 (updated Aug. 2011)

METHODOLOGY

1. This report responds to interrogatories provided by the report sponsors concerning United States law of armed conflict investigation and prosecution practices and policies. Where possible the report relies on primary sources such as statutes or regulations. Occasionally, the report relies on secondary sources to identify primary sources not publicly or immediately available. Observations made without citations to authority are generally based on the author's personal experience as a military lawyer. The report draws exclusively from unclassified or declassified materials available in the public domain. The report does not account for classified materials or practices and investigations not lawfully made public. To that effect, the report does not rely on classified U.S. materials recently published by the Wikileaks organization.

2. Due to the nature of the U.S. system, many interrogatories provoked answers duplicated in responses to other interrogatories. The report treats each interrogatory separately and fully nonetheless and provides cross-references where appropriate.

3. The author updated the report in August 2011 in response to inquiries generated by a review of the initial report.

USAGES

4. United States (U.S.) legal sources employ the terms “law of war” and “law of armed conflict” (LOAC) interchangeably. This report will use both terms to refer to the body of international law that regulates the conduct of hostilities in armed conflict. The term “international humanitarian law” is not widely used in the U.S. government or U.S. legal sources.

A. GENERAL

A1. Provide a general description of the national system for investigation and prosecution of alleged LOAC violations. In particular, describe whether they are handled within the civilian or military justice systems.

5. Civilian and military authorities have concurrent jurisdiction to investigate and prosecute alleged LOAC violations in the U.S. legal system. Generally speaking, the U.S. military has primary jurisdiction to investigate and prosecute LOAC violations by persons affiliated with the armed forces and captured enemies.¹ The military uses both administrative and criminal systems to process alleged LOAC violations. The U.S. civilian criminal justice system supplements the military system with respect to LOAC violations. The civilian system, through various executive branch agencies, investigates and prosecutes LOAC violations by civilians and persons not subject to the U.S. military criminal justice system.² Two Memoranda of Understanding (MOU) between U.S. federal agencies clarify the operation of concurrent jurisdiction over LOAC violations.³

A2. What acts are considered breaches of the law of armed conflict?

¹ See discussion at Section C.4. & 6. for jurisdictional details of the U.S. military justice system, *infra*.

² See discussion at Section B.1. for jurisdictional details of U.S. civilian justice system, *infra*.

³ See discussion at Section D.1. for details of MOUs between executive agencies, *infra*.

6. No U.S. source of law definitively addresses the inquiry. It is likely general rules of international law guide U.S. understandings of what constitutes a breach of LOAC. Although the U.S. is not a Party to the Vienna Convention on the Law of Treaties, no U.S. source contests the Convention's widely accepted definition of a material breach of international law.⁴ The Vienna Convention considers a "material breach" to constitute, in relevant part, "the violation of a provision essential to the accomplishment of the object or purpose of the treaty."⁵ A widely accepted scholarly codification of U.S. foreign relations law adopts in large part the Vienna Convention view on material breach as well.⁶ One may reasonably conclude the same formulation describes material breaches of customary LOAC rules.

7. The U.S. accepts both treaty and customary law as binding sources of LOAC. The U.S. has ratified a large number of LOAC treaties including most recently the 1954 Hague Convention on Cultural Property, and Protocols III (Incendiary Weapons), IV (Blinding Lasers) and V (Explosive Remnants) to the Convention on Conventional Weapons. Notably, however, the U.S. has ratified neither 1977 Protocol to the 1949 Geneva Conventions. Nevertheless, the U.S. regards portions of both Protocols as reflective of customary law binding on all States. Two sources by well-placed authors, one issued in his personal capacity, offer partial evaluations of the customary status of Protocol I.⁷ Yet each source leaves significant segments of Protocol I unaddressed to the frustration of many U.S. military lawyers. Recently, the U.S. has expressed interest in ratifying Protocol II.

4 Vienna Convention on the Law of Treaties art. 60, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (*entered into force* Jan. 27, 1980).

5 *Id.*

6 1 THE AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 335 (1987) [hereinafter: RESTATEMENT OF U.S. FOREIGN RELATIONS LAW]. The Restatement notes that the President has "exclusive authority to determine the existence of a material breach by another party." *Id.* at 217 (providing commentary to § 335).

7 See 1977 Protocols Additional to the Geneva Conventions: Memorandum for Mr. John H. McNeill, Assistant Gen. Counsel, Office of the Sec'y of Def., Customary International Law Implication (May 9, 1986) *reprinted in* THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 388, 389 (Sean Watts ed., 2006); Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 AM. U. J. INT'L L. & POL. 419, 425 (1987).

A3. What breaches of the laws of armed conflict are considered to be war crimes? Is the source of the designation as a “war crime” found in legislation or case law? Please elaborate.

8. Several U.S. legal sources offer definitions of what constitutes a war crime:

- a. United States federal criminal code defines “war crimes” as follows:

18 U.S.C. § 2441(c) Definition.- As used in this section the term “war crime” means any conduct -

“(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

“(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

“(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or

“(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

Under the same statute, so-called “grave breaches of common Article 3” of the 1949 Geneva Conventions include: torture;

cruel or inhuman treatment; performing biological experiments; murder; mutilation or maiming; intentionally causing serious bodily injury; rape; sexual assault or abuse; and taking hostages.⁸ This definition has been characterized as a narrowing of the previous criminal scope of Common Article 3, which had included “outrages upon personal dignity, in particular humiliating and degrading treatment” as punishable under U.S. law.

- b. The U.S. Army Law of Land Warfare Field Manual offers the clearest definition of a war crime. The manual states, “The term ‘war crime’ is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.”⁹ The definition leaves no room for simple, non-criminal breaches of LOAC. A recently updated military law enforcement manual adopts this definition.¹⁰ Yet some within the Department of Defense (DoD) doubt whether this expansive definition is still, or ever was, accurate. The Law of Land Warfare field manual has been under revision for nearly two decades with a new release expected within the year.
- c. More recent DoD sources appear to distinguish war crimes from mere violations of the law of war. For instance, DoD refers to “violation of the law of war” in a directive on reporting requirements.¹¹ A Navy legal handbook mentions separately within the same paragraph violations of LOAC and war crimes, suggesting a distinction between the two.¹² Yet the handbook

8 18 U.S.C. § 2441(d)(1).

9 DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 499, (Jul. 18, 1956) [hereinafter: *Law of Land Warfare*].

10 DEP’T OF THE ARMY, FIELD MANUAL 3-19.13, LAW ENFORCEMENT INVESTIGATIONS, paras. 6-18 (Jan. 10, 2005) [hereinafter: ARMY LAW ENFORCEMENT INVESTIGATIONS].

11 Dep’t of Defense Directive 2311.01E, *DoD Law of War Program*, para. 3.2, (May 9, 2006) [hereinafter: *DoD Law of War Program*].

12 DEP’T OF THE NAVY, NWP 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, para. 6.1.2.1 (July 2007) [hereinafter: NAVAL COMMANDER’S HANDBOOK].

prescribes identical procedural requirements of investigation and reporting for each.

A4. What acts fall within any such legislation or case law?

9. Various U.S. legal sources identify the breaches and acts constituting war crimes differently:

- d. The U.S. Uniform Code of Military Justice (UCMJ), the primary vehicle for prosecuting U.S. service members' violations, does not enumerate substantive offenses against the law of war triable at court-martial. Instead, policy instructs military prosecutors to charge U.S. service members with the underlying conduct of the alleged war crime as a routine criminal offense (e.g. murder, assault, theft...).¹³
- e. Recent legislation enumerates the following acts as punishable violations of the law of war at military commissions against alien unprivileged enemy belligerents through the Military Commissions Act (MCA) of 2009 at 10 U.S.C. 950t:
 - (1) murder of protected persons;
 - (2) attacking civilians;
 - (3) attacking civilian objects;
 - (4) attacking protected property;
 - (5) pillaging;
 - (6) denying quarter;
 - (7) taking hostages;
 - (8) employing poison or similar weapons;

13 LAW OF LAND WARFARE, *supra* note 9.

- (9) using protected persons as a shield;
- (10) using protected property as a shield;
- (11) torture;
- (12) cruel of inhuman treatment;
- (13) intentionally causing serious bodily injury;
- (14) mutilating or maiming;
- (15) murder in violation of the law of war;
- (16) destruction of property in violation of the law of war;
- (17) using treachery or perfidy;
- (18) improperly using a flag of truce;
- (19) improperly using a distinctive emblem;
- (20) intentionally mistreating a dead body;
- (21) rape;
- (22) sexual assault or abuse;
- (23) hijacking or hazarding a vessel or aircraft;
- (24) terrorism;
- (25) providing material support for terrorism;
- (26) wrongfully aiding the enemy;
- (27) spying;
- (28) attempts [charges of inchoate enumerated crimes];
- (29) conspiracy...¹⁴

The 2009 MCA purports to enumerate only offenses that have “traditionally been triable by military commission.”¹⁵ Despite controversy, the U.S. Congress determined the above offenses are not new crimes and existed in international law before their codification in the Act.¹⁶

¹⁴ 10 U.S.C. § 950t.

¹⁵ 10 U.S.C. § 950p(d).

¹⁶ 10 U.S.C. § 950p(d).

- f. In addition to noting grave breaches of the 1949 Geneva Conventions, U.S. military manuals enumerate the following acts as representative of war crimes:
- i. making use of poisoned or otherwise forbidden arms or ammunition;
 - ii. treacherous request for quarter;
 - iii. maltreatment of dead bodies;
 - iv. firing on localities which are undefended and without military significance;
 - v. abuse of or firing on the flag of truce;
 - vi. misuse of the Red Cross emblem;
 - vii. use of civilian clothing by troops to conceal their military character during battle;
 - viii. improper use of privileged buildings for military purposes;
 - ix. poisoning of wells or streams;
 - x. pillage for purposeless destruction;
 - xi. compelling prisoners of war to perform prohibited labor;
 - xii. killing without trial spies or other persons who have committed hostile acts;
 - xiii. compelling civilians to perform prohibited labor;
 - xiv. violation of surrender terms.¹⁷

A military criminal investigative manual adds the crimes of rape and sexual enslavement, citing jurisprudence of the International Criminal Tribunal

¹⁷ LAW OF LAND WARFARE, *supra* note 9, at para. 504. See NAVAL COMMANDER'S HANDBOOK, *supra* note 12, at para. 6.2.6. (enumerating five war crimes not considered grave breaches of the 1949 Conventions).

for Former Yugoslavia.¹⁸ A U.S. Navy legal handbook notes “there is not an exhaustive list of war crimes, they consist of serious intentional violations of the law of armed conflict which are generally recognized as war crimes and may be committed during periods of international or non-international armed conflict.”¹⁹

A5. If breaches of the laws of armed conflict do not amount to war crimes, how are they dealt with?

10. Government officials and agents of the U.S. may be subject to administrative consequences for war crimes or for breaches of the law of war not amounting to war crimes. For instance, members of the armed forces may be subject to administrative separation for misconduct, including minor disciplinary infractions.²⁰ Commanders and other leaders may also be relieved of duties for misconduct not amounting to war crimes.²¹

11. Some acts not provable to the standard of conviction for war crimes in criminal fora may nonetheless constitute torts actionable in civil suits. The Alien Tort Claims Act recognizes causes of action for “violation of the law of nations,”²² including war crimes.²³ Unlike criminal war crimes charges, such claims need only be proved by a preponderance of evidence. However, substantial obstacles including political question doctrine, sovereign immunity, and state secrets doctrine may impede such civil suits arising from conduct in armed conflict. For instance, a recent U.S. Court of Appeals decision affirmed, on state secrets privilege grounds, a

18 ARMY LAW ENFORCEMENT INVESTIGATIONS, *supra* note 10, at paras. 16-18.

19 NAVAL COMMANDER’S HANDBOOK, *supra* note 12, at para. 6.2.6.

20 See e.g. DEP’T OF THE ARMY, REGULATION 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS, Chapter 10, 14, Section III (Apr. 25, 2010) [hereinafter: ARMY ENLISTED SEPARATIONS] (authorizing respectively separation in lieu of court-martial and separation for misconduct of enlisted personnel).

21 See e.g. DEP’T OF THE ARMY, REGULATION 600-20, ARMY COMMAND POLICY, para. 2-17, Mar. 18, 2008).

22 See 28 U.S.C. § 1350.

23 See *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) (citing RESTATEMENT OF THE U.S. FOREIGN RELATIONS LAW, *supra* note 6, at § 404).

lower court's dismissal of a former CIA detainee's torture claims.²⁴

A6. Is your country Party to the International Criminal Court statute? If so, how does that influence the national system of investigation and prosecution regarding alleged LOAC violations?

12. The U.S. is not a Party to the International Criminal Court Statute. Although the U.S. signed the treaty in December of 2000, in May of 2002, the President notified the UN Secretary General the U.S. did not intend to ratify the Rome Statute.²⁵

A7. Does your country treat human rights law as applicable in armed conflict? If so, on what basis and to what extent?

13. Under the U.S. view, two positions prevent human rights law from operating fully during armed conflict. First, the U.S. regards human rights obligations as non-extraterritorial. The U.S. interpretation of the International Covenant on Civil and Political Rights (ICCPR) is illustrative. The U.S. interprets article 2(1) of the ICCPR as a chapeau provision, requiring both an exercise of jurisdiction *and* territorial presence to trigger a State Party's obligations under the treaty.²⁶ Thus, only U.S. sovereign acts during armed conflict on its own territory would be potentially regulated by the ICCPR.

Second, the U.S. asserts that the law of war operates as the *lex specialis*, or primary source of legal obligations, during armed conflict. The U.S. maintains that law of war authorizations and restraints displace

24 Mohamed v. Jeppesen Dataplan, Inc., No. 08-15693 (9th Cir. 2010).

25 Letter from John R. Bolton, Undersecretary of State for Arms Control and International Security to U.N. Secretary General Kofi Annan, (May 6, 2002).

26 See Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?*, 12 ILSA J. INT'L & COMP. L. 459, 463, 472 (2006) (presenting personal views while serving as Attorney-Advisor, Office of Legal Adviser, U.S. Department of State).

those drawn from other legal regimes, such as human rights law, during armed conflict.²⁷

Taken together, the doctrines of non-extraterritoriality and *lex specialis* greatly reduce the instances in which the U.S. would regard human rights law as applicable in armed conflict, if at all.

A8. *Is your country subject to national/regional human rights tribunals or other fora which could investigate alleged LOAC violations (e.g., European Court of Human Rights)? If so, please briefly describe any key cases in that regard.*

14. The U.S. has not consented to standing jurisdiction before any regional human rights tribunal to investigate LOAC violations. The U.S. is a member of the Organization of American States but is not a Party to that body's human rights instrument, the American Convention on Human Rights.²⁸ Nor is the U.S. subject to the jurisdiction of the Inter-American Court of Human Rights. In November 2005, however, the Inter-American Commission on Human Rights extended precautionary measures concerning U.S. detention operations at the Naval Base at Guantanamo Bay, Cuba.²⁹ The Commission requested the U.S. investigate and prosecute instances of torture and mistreatment of detainees. Specifically, the Commission expressed concern that investigations to date had been internal to the DoD, calling into question impartiality.³⁰ In 2006, the Commission issued a resolution calling on the U.S. to close the Guantanamo Bay detention facility.³¹ The U.S. responded that the Commission lacked jurisdiction and

²⁷ See *Id.*

²⁸ American Convention on Human Rights, 1144 UNTS 123 (Nov. 22, 1969). The U.S. has signed but not ratified the American Convention. See Organization of American States, Department of International Law, Multilateral Treaties, *available at*: www.oas.org/juridico/english/sigs/b-32.html.

²⁹ See Center for Constitutional Rights, *Inter-American Commission on Human Rights Extends Precautionary Measures on Guantanamo Detainees*, *available at*: <http://ccrjustice.org/newsroom/press-releases/inter-american-commission-human-rights-extends-precautionary-measures-guant%C3%A1>.

³⁰ See *Id.*

³¹ Inter-American Commission on Human Rights, Resolution No. 2/06, *available at*: www.cidh.oas.org/

reiterated that the law of war rather than human rights law is the legal regime applicable to detention operations at Guantanamo.³²

A9. What other options are available for investigating possible LOAC violations (e.g., public inquiries, parliamentary hearings, special prosecutors)?

15. In addition to the military and civilian criminal justice systems, the U.S. Congress also has power to investigate possible LOAC violations.³³ The Congress wields broad subpoena powers to which the Executive branch generally responds. Recently, Congress conducted a detailed investigation into reports of U.S. armed forces' abuse of detainees at the Abu Graib prison in Iraq.³⁴

A10. What is the basis for criminal jurisdiction over breaches of the laws of armed conflict in your country (territoriality, nationality, passive personality, protective)?

16. The U.S. War Crimes Act applies without regard to territory.³⁵ The Act establishes *in personam* jurisdiction on the basis of both nationality and passive personality. By its terms, the Act reaches war crimes committed by or against "a member of the Armed Forces of the United States or a national of the United States."³⁶

resolutions/resolution2.06.htm.

32 STATE DEP'T, DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 935-936 (2007) available at: www.state.gov/documents/organization/147120.pdf.

33 See also response B.5, *infra*.

34 United States Senate, Committee on Armed Services, *Inquiry into the Treatment of Detainees in U.S. Custody* (Nov. 20, 2008), available at: <http://documents.nytimes.com/report-by-the-senate-armed-services-committee-on-detainee-treatment>. See U.S. House of Representatives, House Armed Services Comm., *Oversight Plan for the 110th U.S. Congress*, available at: <http://armedservices.house.gov/oversight110.shtml>. See also response B.5, *infra*.

35 18 U.S.C. § 2441(a).

36 18 U.S.C. § 2441(b).

17. The U.S. criminal code also includes a provision that extends jurisdiction over certain offenses to so-called Special Maritime and Territorial Jurisdiction (SMTJ).³⁷ Covered sites include: portions of the high seas; vessels licensed to the U.S.; lands under exclusive or concurrent jurisdiction of the U.S. including a “fort, magazine, arsenal, dockyard, or other needful building;” islands or rocks containing guano; aircraft belonging to the U.S.; space vehicles; foreign vessels departing from or scheduled to arrive in the U.S. on which offenses are committed against U.S. nationals; and with respect to passive personality, U.S. diplomatic, consular, military or other missions or entities in foreign States including building, land, and residences.³⁸ The statute essentially converts the named sites into an element of the charged offense.³⁹ A federal district court recently convicted, a CIA civilian contractor under SMTJ for a fatal assault on a detainee at a small firebase in Afghanistan.⁴⁰ The incident pre-dated an amendment to the UCMJ that would arguably have permitted trial of the contractor at court-martial.

18. Finally, the U.S. Congress recently added the Military Extraterritorial Jurisdiction Act (MEJA) to the U.S. criminal code.⁴¹ The Act extends federal jurisdiction to civilians accompanying the armed forces outside the U.S., charged with felony offenses applicable under SMTJ. In 2004, the Act expanded further to cover contractors and civilian employees of federal agencies “to the extent such employment relates to supporting the mission of the Department of Defense overseas.”⁴²

37 18 U.S.C. § 7.

38 *Id.*; The U.S.A. P.A.T.R.I.O.T. act extended SMTJ to the final enumeration of sites, including military facilities, in 2001. Pub. L. No. 107-56, § 804, 115 Stat. 272, 377 (codified at 18 U.S.C. §7(9) (2006)). The expansion was likely a response to an interpretation that had excluded U.S. military installations from SMTJ. *See United States v. Gatlin*, 216 F.3d 207 (2nd Cir. 2000).

39 *See United States v. Brisk*, 171 F.3d 514, 520 n.4 (7th Cir. 1999).

40 *United States v. Passaro*, (aff’d in part 577 F.3d 207 (4th Cir. 2009)) (cert. denied 130 S.Ct. 1551 (2010)). *See response B.6, infra.*

41 18 U.S.C. § 3261, Pub.L. No. 106-523. *See response B.6, infra.*

42 2005 National Defense Authorization Act, Sec. 1088.

A11. Does the national war crimes legislation jurisdiction extend to members of the military? If so, under what circumstances?

19. Members of the U.S. military are subject to the U.S. criminal code as well as the U.S. military justice system. They may be prosecuted under the war crimes provisions of the U.S. Code through the federal civilian criminal system. However, pursuant to inter-agency agreements between the (DoJ) and DoD, service members are far more likely to be tried under the military system.⁴³ Additionally, Article 134 of the U.S. UCMJ permits incorporation of offenses under the U.S. criminal code at court-martial.⁴⁴ Thus, all “crimes and offenses not capital” under the federal criminal code may be tried at court-martial.⁴⁵ At such trials, the actual offense tried is the federal civilian offense rather than a substantive offense under the UCMJ.⁴⁶ Article 134 has been used to prosecute offenses involving firearms and child pornography.⁴⁷ Research revealed no instances of incorporation of national war crimes legislation at court-martial.

A12. Is there universal jurisdiction and how is such jurisdiction exercised?

20. The U.S. is a Party to the four 1949 Geneva Conventions and is therefore obligated to prosecute or extradite grave breaches on a universal basis.⁴⁸ A widely accepted scholarly codification of U.S. international law

43 See response D.1, *infra*.

44 10 U.S.C. § 934(3).

45 *Id.*

46 See *United States v. Pullen*, 41 M.J. 886 (1995).

47 See Eric Talbot Jensen & James J. Teixeira, Jr., *Prosecuting Members of the U.S. Military for Wartime Environmental Crimes*, 17 GEORGETOWN INT'L ENV'T'L. L. REV. 669 (2004-2005) (citing *United States v. Evans*, 33 M.J. 309 (1991) and *United States v. Irvin*, 60 M.J. 23 (2004)).

48 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 UST 3114, 75 UNTS 31, art. 49 [hereinafter: 1949 Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 UST 3217, 75 UNTS 85, art. 50 [hereinafter: 1949 Geneva Convention III]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135, art. 129 [hereinafter: 1949 Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287, art. 146 [hereinafter: 1949 Geneva Convention IV].

practices also expresses support for universal jurisdiction.⁴⁹ However, the U.S. has not fully implemented universal jurisdiction in its domestic law.⁵⁰ Both the military justice system and the civilian federal courts operate under subject matter and personal jurisdiction limitations that prevent prosecution on the basis of purely universal jurisdiction.

A13. Does your country deal with the issue of “command responsibility”? If so, how?

21. The U.S. military justice system does not include a specific provision for command responsibility as a theory of liability.⁵¹ Some debate exists concerning the extent to which the U.S. has incorporated command responsibility into the military justice system. A recently retired DoD Senior Associate Deputy General Counsel for International Law, while serving as a military lawyer, argued the U.S. UCMJ fully implements command responsibility.⁵² A military law scholar and retired military lawyer, disagrees, speculating that various substantive provisions of UCMJ, such as involuntary manslaughter and dereliction of duty, might be used to hold a commander responsible for war crimes of subordinates.⁵³ He notes, however, that available punishment would not accord with true command responsibility theory.⁵⁴ Moreover, dereliction of duty charges fail to approximate command responsibility charges because, as a substantive charge rather than theory of liability, the former do not permit true imputation of subordinates’ offenses to the commander or leader.⁵⁵

49 RESTATEMENT OF U.S. FOREIGN RELATIONS LAW, *supra* note 6, at § 404.

50 *But see* response B.1, *infra* (discussing *United States v. Yunis*).

51 Victor Hansen, *Time for the United States to Adopt a Standard of Command Responsibility Towards its Own*, 42 GONZAGA L. REV. 335, 388 (2006-2007) (noting as inexplicable the 1950 omission of command responsibility in the UCMJ) (citing Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 156, 212 (2000)) [hereinafter: Hansen].

52 William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 104 (1973).

53 Hansen, *supra* note 51, at 390.

54 *Id.*

55 10 U.S.C. § 892.

22. A 1986 DoD memorandum addressing the customary status of provisions of Additional Protocol I to the 1949 Geneva Conventions does not include the Article 85 expression of command responsibility as reflective of customary international law.⁵⁶ Nor does the memo include Article 85 as a provision “supportable for inclusion in customary law through state practice.” However, contemporaneous remarks by a State Department attorney vaguely suggest otherwise.⁵⁷

23. On the other hand, various military legal manuals indicate strong support for command responsibility. An Army legal manual states that military commanders may be responsible for war crimes committed by subordinates.⁵⁸ The manual describes the standard of liability as arising if a commander “has actual knowledge, or should have knowledge, through reports received by him or through other means that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take reasonable steps to insure compliance with the law of war or to punish violators thereof.”⁵⁹

24. Military and civilian case law have explored the standards of liability for commanders. U.S. courts first endorsed the doctrine of command responsibility in the trial by military commission of Japanese General Tomoyuki Yamashita.⁶⁰ The U.S. Supreme Court upheld, over two strongly worded dissents, General Yamashita’s conviction for failing to prevent atrocities by subordinates.⁶¹

56 See 1977 Protocols Additional to the Geneva Conventions: Memorandum for Mr. John H. McNeill, Assistant Gen. Counsel, Office of the Sec’y of Def., Customary International Law Implication (May 9, 1986) reprinted in THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, LAW OF WAR DOCUMENTARY SUPPLEMENT 388, 389 (Sean Watts ed., 2006).

57 Michael Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention* 2 AM. U.J. INT’L L. & POLICY 419 (1987).

58 LAW OF LAND WARFARE, *supra* note 9, at para. 501.

59 *Id.*; A Navy legal handbook offers a substantially similar description of command responsibility. NAVAL COMMANDER’S HANDBOOK, *supra* note 12, at para. 6.1.3.

60 Trial of General Tomoyuki Yamashita United States Military Commission, Manila (Dec. 7, 1945), in IV LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1948).

61 327 U.S. 1 (1946).

25. Despite the *Yamashita* precedent, subsequent U.S. military tribunals have not applied command responsibility theory widely. In 1971, a court-martial acquitted the commander of an infantry rifle company involved in unlawful killings at My Lai, Vietnam. Over government objections, the military judge reduced the prosecution's intentional murder charges to involuntary manslaughter and issued panel (jury) instructions requiring the commander have had actual knowledge of soldiers' crimes and failed to act to prevent them.⁶²

26. In civil litigation also arising from the My Lai incident, a federal court affirmed a Court of Claims dismissal of a retired Brigadier General's challenge to administrative sanctions imposed for his failure to investigate.⁶³ The court found the General personally culpable for failure to investigate stating, "a commander clearly must be held responsible for those matters which he knows to be of serious import..."⁶⁴ The court supported the Secretary of the Army's sanctions including, loss of temporary rank, a letter of censure, and revocation of an important military decoration. Although serious, these sanctions did not approach the severity of consequences one would have expected under criminal command responsibility. The court added, however, "There is no single area of administration of the Army in which strict concepts of command liability need more to be enforced than with respect to vigorous investigations of alleged misconduct."⁶⁵

27. Finally, in *Ford v. Garcia*, a federal Court of Appeal upheld a lower court's jury instructions on a Torture Victim Protection Act (TVPA) claim.⁶⁶ In instructions, the trial judge equated the standard for liability with command responsibility doctrine requiring: (1) a superior-subordinate

62 See Hansen, *supra* note 51, at 394 (reproducing in full the military judge's instructions on liability). Acquittals at U.S. courts-martial do not produce opinions or full records of trial.

63 *Koster v. United States*, 685 F.2d 407 (1982).

64 685 F.2d at 410.

65 *Id.* at 414.

66 289 F.3d 1283 (11th Cir 2002).

relationship between the defendant and the perpetrator of the underlying offense; (2) that the defendant knew or should have known owing to the circumstances that his subordinates were committing or planned to commit acts in violation of the law of war; and (3) the defendant failed to prevent or punish the crimes.⁶⁷ The court noted that the legislative history of the Act clearly indicated the U.S. Congress intended to adopt the doctrine of command responsibility from international law through the TVPA.⁶⁸

A14. Does your country deal with the “defence of superior orders”? If so, how?

28. A number of military legal sources exclude superior orders as a defense against liability for war crimes.⁶⁹ The relevant *mens rea* is that a service member under similar circumstances would know the order to be unlawful. One source instructs finders of fact to consider that members of the armed forces often lack the training and opportunity to “weigh scrupulously the legal merits of the orders received.”⁷⁰ Additionally, this source reserves the right of combatants to commit what are otherwise violations of the law of war as reprisals.⁷¹

67 289 F.3d at 1288.

68 *Id.* at 1289.

69 NAVAL COMMANDER’S HANDBOOK, *supra* note 12, at para. 6.2.6.4.1 (stating, “The fact that a person committed a war crime under orders of his military or civilian superior does not by itself relieve him of criminal responsibility under international law.”); LAW OF LAND WARFARE, *supra* note 9, at para. 509 (stating, “The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.”)

70 LAW OF LAND WARFARE, *supra* note 9, at para. 509b.

71 *Id.*

B. THE CIVILIAN JUSTICE SYSTEM

B1. What is the structure of the civilian system of justice and the role of civilian courts, the attorney general or an equivalent prosecution authority and the civilian police in general, and specifically regarding the investigation and prosecution of alleged LOAC violations?

a. Federal Civilian Court Jurisdiction

29. The U.S. civilian judicial system is comprised of both federal and state entities. The federal system draws authority primarily from Articles I, II, and III of the United States Constitution. State courts, prosecutors and investigators typically draw authority from the states' respective constitutions. From a practical standpoint, the primary difference between federal courts and state courts concerns the types of cases heard. Federal courts hold limited jurisdiction, with authority only to hear cases involving, *inter alia*, violations of national law, cases concerning foreign States and their citizens, and cases between citizens of varying state residency.⁷² State courts, by contrast, are courts of general jurisdiction, empowered to hear nearly any claim grounded in law. Because of the federal nature of violations of LOAC, this section will focus on describing the U.S. federal justice system.

30. The federal court system requires subject matter jurisdiction to hear cases.⁷³ It is likely that federal question jurisdiction would cover LOAC violations.⁷⁴ Under Article III of the U.S. Constitution, federal courts may hear "all cases, in law and equity, arising under this Constitution, and the

⁷² See U.S. Const., Art. III, sec. 2, cl.1.

⁷³ Federal courts' actual subject-matter jurisdiction derives from Congressional enabling statutes, such as 28 U.S.C. §§ 1330-1369 and 28 U.S.C. §§ 1441-1452.

⁷⁴ Federal question jurisdiction is further codified in the 28 U.S.C 1331, stating: "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The second form of jurisdiction is diversity jurisdiction, which allows individuals from separate states and exceeding a required amount in controversy a forum for an impartial fact finding.

laws of the United States, and Treaties...”⁷⁵ Traditionally, the Supreme Court of the United States interprets authority to hear federal questions broadly, requiring cases only have a “federal ingredient” to be heard.⁷⁶ Congress has refined this discretion, requiring that federal cases “arise out” of federal law under federal question jurisdiction.⁷⁷ The Supreme Court has held that questions arising from state law do not meet federal question scrutiny.⁷⁸ The U.S. Congress has criminalized several potential LOAC violations making the clearest case for federal question subject matter jurisdiction.⁷⁹ Although challenges to litigation exist,⁸⁰ most LOAC cases would likely not be dismissed for lack of subject matter jurisdiction.⁸¹

31. Notwithstanding strict constitutional requirements of federal question jurisdiction, there is ample evidence that domestic civilian courts may exercise jurisdiction regarding LOAC violations.⁸² Jurisdictional bases include: (1) nationality, where the offender is a national of the prosecuting country; (2) territorial, where a crime occurs in or affects a prosecuting State’s territory; (3) protective, where a crime affects a State’s vital interests, governmental integrity, or security; (4) passive personality, where the victim of the crime is a national of the prosecuting State; and (5) universality, involving crimes against the interests of the entire international community.⁸³

75 US Const, Art. III, Sec. 2

76 *Osborn v. Bank of the United States*, 22 U.S. 738 (1824).

77 28 U.S.C. § 1331.

78 *Louisville & N.R. Co. v. Mottley*, 211 U.S. 149 (1908).

79 18 U.S.C. § 1091 (identifying acts of genocide as punishable offense under U.S. federal law); 18 U.S.C. § 1203 (identifying hostage taking of United States citizens, inside or outside the United States as a federal crime); 18 U.S.C. § 2441 (identifying various acts inconsistent with U.S. treaty law and considered war crimes punishable under U.S. federal law).

80 *See Nguyen Thang Loi v. Dow Chem. Co.* 373 F. Supp. 2d 7, 19 (E.D. N.Y. 2005) (stating that spraying of the herbicide agent orange did not constitute a war crime pre-1975).

81 373 F. Supp. 2d at 7.

82 RESTATEMENT OF U.S. FOREIGN RELATIONS LAW, *supra* note 6, at § 402 (1987). *See also* Jack Morse, *War Criminal or Just Plain Felon? Whether Providing Material Support for Terrorism Violates the Laws of War and is Thus Punishable by Military Commission*, 26 GA. ST. U. L. REV. 1061, 1077 (2010).

83 RESTATEMENT OF U.S. FOREIGN RELATIONS LAW, *supra* note 6, at § 402.

32. Foreign nationals have been brought to the United States and tried in the federal civilian system for violations of U.S. federal law. In *United States v. Yunis*, the District of Columbia Court of Appeals confirmed jurisdiction over an individual forcibly brought to the U.S. to stand trial for violation of the 1979 International Convention against the Taking of Hostages.⁸⁴ The defendant hijacked a Jordanian Airlines aircraft in Lebanon on which a number of U.S. citizens were traveling. Yunis argued, *inter alia*, the court lacked subject matter jurisdiction.⁸⁵ The court determined subject matter jurisdiction existed based on violation of the statute itself, namely that American citizens were aboard the aircraft when hijacked and thus jurisdictional requirements were met.⁸⁶ The court stated further that the statute reflects “an unmistakable congressional intent, consistent with treaty obligations of the United States, to authorize prosecution of those who take Americans hostage abroad no matter where the offense occurs or where the offender is found.”⁸⁷

33. The *Yunis* Court also noted two general theories supporting jurisdictional requirements, the “universal” and “passive personal” jurisdiction doctrines.⁸⁸ The court stated that under the universal principle of jurisdiction states may prosecute certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism even absent any special connection between the state and the offense.⁸⁹ The court stated further that aircraft hijacking may be “one of the few crimes so clearly condemned under the law of nations that states may assert universal jurisdiction to bring offenders to justice, even when the state has no territorial connection to the hijacking and its

84 *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

85 924 F.2d at 1090.

86 *Id.*

87 *Id.* at 1091.

88 *Id.*

89 *Id.*; Internal citation quotation omitted (citing RESTATEMENT OF U.S. FOREIGN RELATIONS LAW, *supra* note 6, §§ 404, 423 (1987).

citizens are not involved.”⁹⁰ Although not brought as a LOAC violation, this case illustrates, in theory, how the United States might bring an alien’s LOAC violation into civilian federal court.

34. Additionally, federal question jurisdiction over LOAC violations could stand through the Alien Tort Claims Act (ATCA).⁹¹ Claimants alleging violation of the ATCA would establish federal question jurisdiction by virtue of the Act’s longstanding statutory codification. While the Supreme Court has not addressed genocide, hostage taking, or war crimes as ATCA claims in detail, the Court has interpreted the ATCA with respect to jurisdiction.⁹² In *Sosa v. Alvarez-Machain*, the Supreme Court held violations of international law establish federal jurisdiction so long as claims are based on “a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.”⁹³ The Supreme Court added that violations of the ATCA are subject to “vigilant door keeping” and identified “no congressional mandate [for federal courts] to seek out and define new and debatable violations of the law of nations.”⁹⁴ The Supreme Court has also instructed the federal courts to examine jurisdiction by determining whether a norm is sufficiently definite to support a cause of action... [involving an] element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”⁹⁵

35. The U.S. Global War on Terrorism has produced several cases alleging international law violations by foreign civilians in U.S federal criminal proceedings. Prosecutors indicted Richard Reid, the alleged “shoe bomber,” for attempted murder, hijacking, and use of a weapon of mass-

90 *Id.* at 1092; *See also* response A.12., *supra* (discussing universal jurisdiction).

91 28 U.S.C. § 1350. *See also* response A.5, *supra* (discussing Alien Tort Claims Act jurisdiction).

92 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

93 542 U.S. at 725, 732.

94 *Id.* at 729, 728.

95 *Id.* at 733.

destruction.⁹⁶ Reid pled guilty to eight indictments and was sentenced to three consecutive life terms without the possibility of parole on October 4, 2002.⁹⁷ In addition to Reid, DoJ indicted Zacarias Moussaoui, accusing him of conspiring with Al Qaeda as the twentieth hijacker of September 11, 2001.⁹⁸ The indictment included charges of conspiracy to commit terrorism, conspiracy to commit aircraft hijacking, and conspiracy to kill U.S. employees.⁹⁹ On May 4, 2006 the court sentenced Moussaoui to six consecutive life terms without the possibility of parole.¹⁰⁰ More recently, DoJ unsealed indictments against two Iraqi citizens for participation in an insurgency against the Iraqi government.¹⁰¹ These cases, although not fashioned as direct LOAC violations, will likely be brought to federal court as routine substantive federal criminal offenses.

b. Federal Civilian Investigative Authority

36. The Federal Bureau of Investigation (FBI) derives its general investigative authority from statutory provisions stating, “the Attorney General may appoint officials to detect and prosecute crimes against the United States.”¹⁰² A statutory source of supervisory control over the investigative functions of the FBI identifies the Attorney General as an advisor, approving regulations proposed by the Director of the FBI.¹⁰³ The Attorney General also oversees various regulations on the FBI, including, but not limited to, the regulation of investigatory techniques employed

96 Indictment, *United States v. Reid*, (D. Mass. 2002) (No. 02-10013-WGY), *available at*: <http://news.findlaw.com> (last visited May 21, 2011).

97 U.S. Department of Justice, Federal Bureau of Investigation, *Terrorism 2002-2005*, *available at*: www.fbi.gov/stats-services/publications/terrorism-2002-2005/terror02_05#page_11.

98 Indictment, *United States v. Moussaoui*, No. 1:01-cr-00455-A, (E.D. Va. 2001) *available at*: <http://notablecases.vaed.uscourts.gov>.

99 *Id.*

100 Timothy Dwyer, *One Juror Between Terrorist and Death*, WASH. POST (May 12, 2006), *available at*: www.washingtonpost.com/wp-dyn/content/article/2006/05/11/AR2006051101884.html.

101 Indictment, *United States v. Alwan and Hammadi*, No. 1:11-cr-13-R (W.D. Ky. 2011) (charging violations of 18 U.S.C. §§ 842(p)(2), 2332(b)(2), 2332a(a)(1), 2332g, 2339A, & 2339B).

102 28 U.S.C § 533(1).

103 *Id.* at (4)(a).

by the FBI during domestic operations.¹⁰⁴ The *Attorney General's Guide for Domestic Operations* indicates appropriate forms of investigative techniques.¹⁰⁵

37. In addition to the power to investigate, the FBI also has statutory authority to arrest.¹⁰⁶ The DoJ has interpreted this provision as granting broad investigative authority,¹⁰⁷ permitting the FBI to investigate all crimes against the United States except where Congress has specifically assigned the responsibility to investigate to another exclusive agency.¹⁰⁸ The DoJ has also determined that the FBI's investigative and arrest authority extends to extraterritorial investigations and arrests, affirming its power to investigate and arrest persons for violations of customary international law.¹⁰⁹ The DoJ justified this position by citing various examples where Congress has extended FBI jurisdiction extraterritorially.¹¹⁰ The DoJ identified Congressional intent to extend the FBI's extraterritorial authority based on the FBI's role as the chief enforcement unit for the statutes in which Congress extended authority abroad. Thus DOJ concluded Congress intended that the FBI's authority too would be extended abroad.¹¹¹ The DoJ has consistently held the position that the FBI's investigative power derives from a delegation of investigative authority from the Attorney General.¹¹² The opinion's weight is reflected in the Government's Code of

104 THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS (2006), available at: www.ignnet.gov/pande/standards/prgexhibitg1.pdf.

105 *Id.*

106 18 U.S.C § 3052 [emphasis added].

107 *United States v. Marzani*, 71 F. Supp. 615, 617 (D.D.C. 1947), *aff'd*, 168 F.2d 133 (D.C. Cir.), *aff'd*, 335 U.S. 895 (1948) (per curiam).

108 *Delegation of the Attorney General's Authority to Investigate Credit Card Fraud*, 7 U.S. Op. Off. Legal Counsel 172 (1983).

109 *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 U.S. Op. Off. Legal Counsel 163 (1989) [hereinafter: *Authority to Override International Law*].

110 See e.g., 18 U.S.C § 844(i) (enacting penalties for destruction of property used in foreign commerce); 18 U.S.C § 1116(c) (implementing Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons); 18 U.S.C § 1472(l) (enacting penalties for carrying weapons or explosives aboard aircraft).

111 See *Authority to Override International Law*, *supra* note 109.

112 See *FBI Authority to Investigate Violations of Subtitle E of Title 26 or 18 U.S.C. Sections 921-930*, 20 U.S. Op. Off. Legal Counsel 242 (1996); *Authority to Override International Law*, *supra* note 109.

Federal Regulations which states the duties and responsibilities of the FBI including to “[i]nvestigate violations of the laws ... of the United States and collect evidence in cases in which the United States is or may be a party in interest, except in cases in which such responsibility is by statute or otherwise exclusively assigned to another investigative agency.”¹¹³

38. The FBI has no prosecutorial duties.¹¹⁴ The traditional function of the FBI is to serve as the primary investigative unit on behalf of the Department of Justice.¹¹⁵ A DoJ Office of Legal Counsel opinion states U.S. law “confers investigative powers upon an FBI official, [as well as] a prosecutorial duty to follow up any investigation undertaken.”¹¹⁶ This statement, however, has not been interpreted to grant the FBI prosecutorial authority. Instead it is read as conveying a duty to support the prosecutorial duties of the DoJ. Additionally, the Code of Federal Regulations makes no indication that the FBI has any authority to prosecute crimes, only to investigate and assist in the prosecutorial authority of the DoJ.¹¹⁷

B2. If there is an attorney general or similar individual in your country, what is his or her role, in particular with regard to incidents that involve possible LOAC issues or possible LOAC violations? Does he/she provide advice on legal matters, supervise subordinate prosecutors, oversee investigative or police personnel? Who has the authority to determine whether or not to prosecute? Is there any other relevant authority?

39. The Attorney General of the United States derives authority from the United States Code (U.S.C.) and is appointed by the President of the

¹¹³ 28 C.F.R. § 0.85(a) (1995) [emphasis added].

¹¹⁴ 18 U.S.C. § 3052.

¹¹⁵ *Authority to Override International Law*, *supra* note 109.

¹¹⁶ *Authority of FBI Agents, Serving as Special deputy United States Marshals, to Pursue Non-Federal Fugitives*, 19 U.S. Op. Off. Legal Counsel 33 (1995) [emphasis added] (citing *Bergman v. United States*, 551 F. Supp. 407, 417 (W.D. Mich. 1982)).

¹¹⁷ See generally 28 C.F.R. § 0.85 (a) through (o) (indicating no specific grant of authority given to the FBI for prosecutorial authority, and indicating that the FBI shall have specific investigative functions as well as the general functions) see 28 C.F.R. §0.85 (a), (b), (c), (g), (i), (l), (n), (o).

United States.¹¹⁸ Final appointment requires approval of the United States Senate.¹¹⁹ The Attorney General serves at the pleasure of the President.

40. Among the general powers of the Attorney General, several potentially apply to LOAC violations.¹²⁰ The Attorney General relies on statutory provisions to authorize investigations into federal crimes.¹²¹ The DoJ relies on this provision for authority to investigate all criminal violations, except where Congress has specifically delegated the responsibility to a specific and exclusive agency.¹²² The DoJ has concluded the FBI's power to investigate may not be transferred to other executive agencies.¹²³

41. The Attorney General's main source of investigative authority also authorizes investigation of federal criminal offenses involving government officers and employees.¹²⁴ The relevant statute states, "The Attorney General and the Federal Bureau of Investigation may investigate any violation of Federal criminal law involving Government officers and employees".¹²⁵ The permissive language of the statute confers substantial prosecutorial discretion.¹²⁶ A federal court of appeal clarified that the Attorney General may not be forced to prosecute a claim, and decisions concerning prosecution are discretionary.¹²⁷ The Supreme Court of the United States has also recognized the Attorney General's power of

118 U.S. Constitution, art. II, §2.

119 *Id.*

120 In addition to the specific powers listed, the U.S. Attorney General may appoint the director of the Federal Bureau of Investigation. *See* 28 U.S.C. § 532. The Attorney General may also appoint officials to prosecute crimes protect the president and investigate official matters under the Department of Justice and the Department of the State. *See* 28 U.S.C. § 533.

121 28 U.S.C. § 533 (noting the grant of authority is not exclusive, not intended to "limit the authority of departments and agencies to investigate crimes against the United States when investigative jurisdiction has been assigned by law to such departments and agencies").

122 *Delegation of the Attorney General's Authority to Investigate Credit Card Fraud*, 7 U.S. Op. Office Legal Counsel 172 (1983).

123 *Id.*

124 28 U.S.C § 535(a) and (b) (2010).

125 *Id.*

126 *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965).

127 *Id.*

prosecutorial discretion, holding that the Attorney General retains “broad discretion” to enforce criminal laws.¹²⁸ The Supreme Court presumes that the Attorney General has properly discharged his duty unless clear evidence indicates otherwise.¹²⁹

42. The U.S. Attorney General also performs an advisory function. The Attorney General must give legal opinions when requested by the President or the head of an executive department of the government.¹³⁰ The Attorney General serves a discretionary role in providing legal opinions requested by the military.¹³¹ To petition the Attorney General, law requires that the military have no statutory authority concerning the subject of the petition, in essence, permitting the military to consult the Attorney General where the military lacks authority to resolve a legal question.¹³² Virtually no substantial litigation regarding the legality of the Attorney General’s advisory function regarding the military exists, primarily due to the discretionary nature of the role.

43. Clarification of the Attorney General’s advisory function has traditionally come from the Attorney General’s own advisory opinions.¹³³ Although dated primarily to the early twentieth century, the Attorney General’s early opinions regarding military advisory opinions reflect the modern state of the Attorney General’s discretionary function. Most of these opinions conclude the Attorney General may issue advisory opinions to the military but these opinions do not carry the full force and effect of law, nor do they represent the outcome of potential litigation. Thus,

128 *United States v. Armstrong*, 517 U.S. 456 (1996).

129 *Id.*

130 See 28 U.S.C. § 511; 28 U.S.C. § 512.

131 28 U.S.C. § 513.

132 *Id.*

133 See 9 U.S. Op. Atty. Gen 32 (1857) (stating that the Attorney General’s opinion is advisory alone and does not stand for a determination of the outcome of the case); 21 U.S. Op. Atty. Gen 594 (1897) (stating the Attorney General is without authority to answer questions of fact); 25 U.S. Op. Atty. Gen 543 (1905) (stating that questions of administrative discretion will not be addressed by the Attorney General); 28 U.S. Op. Atty. Gen 129 (1909); 34 U.S. Op. Atty. Gen 162 (1924) (stating that hypothetical situations will not be addressed by the Attorney General).

the Attorney General's opinions make clear that the role advisory role is largely discretionary and not subject to challenge.

44. The frequency with which military departments request opinions from the Attorney General cannot be reliably determined, nor can the complete content of such requests be determined. Although a number of opinions have been cited in government documents or leaked, opinions of the Attorney General, especially those of the Office of Legal Counsel are not routinely published or cataloged by any official or comprehensive public source.

45. Within the DoJ, the Office of the Attorney General does not actually write its advisory opinions. The task falls to the Office of Legal Counsel (OLC).¹³⁴ The OLC drafts many of its opinions and prepares oral advice in response to requests from the President, agencies and the military.¹³⁵ A published OLC opinion is regarded as that of the Attorney General.¹³⁶ Despite autonomy in issuing opinions, the Attorney General regulates the advisory opinions issued by the OLC internally, through a review and comment process.¹³⁷ Severe professional repercussions attach to those failing to meet the Attorney General's memorandum on standards.¹³⁸

46. The U.S. Code of Federal Regulations (CFR) states that the OLC shall be responsible for "[p]reparing the formal opinions of the Attorney General, rendering informal opinions and legal advice to the various agencies of the Government, and assisting the Attorney General in the performance of his functions as legal adviser to the President."¹³⁹ These opinions have a tradition of sanctioning courses of conduct, advising

134 28 C.F.R § 0.25 (2008).

135 See Dep't of Justice, Office of Legal Counsel, *About OLC*, available at: www.justice.gov/olc.

136 28 C.F.R § 0.25 (2008).

137 See "Memorandum For Attorney's of the Office" (July 2010). Available at: www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf.

138 *Id.* at Section II B, C, D, and E page 2-4.

139 28 C.F.R. §0.25(a) (2007).

officials on potential legal exposure, and shaping how DoJ enforces the law as a practical matter.¹⁴⁰ Office of Legal Counsel opinions also serve as a possible shield to liability.¹⁴¹

47. The years 2001 to 2009 saw changes in many U.S. lawyers' outlook on OLC opinions. In 2009, the OLC officially withdrew five opinions relating to the use of "interrogation techniques" on detainees held for questioning in connection with terrorist activity during armed conflict.¹⁴² The withdrawals followed a statement and Executive Order by President Obama a mere two days after taking office. The statement emphasized that no OLC opinion issued between 2001 and 2009 could be deemed reliable.¹⁴³ This statement was made primarily in reference to the now infamous "Torture Memos," some of which specifically addressed violations of LOAC and the conditions of application of LOAC.¹⁴⁴ Leaked copies of the memos justified the use of various torture related techniques, largely failing to account for legal positions that did not support the use of such techniques. In 2003, following the publication of the leaked memos and strong negative reactions, Jack Goldsmith, the head of the OLC at the time, withdrew memos on the basis concluding they were "deeply flawed".¹⁴⁵ The OLC's opinions are still considered credible and still bind U.S. executive branch agencies despite the negative mark made by the so-called "Torture Memos."

140 *The Immunity-Confering Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086 (2008).

141 *Id.* at 2109.

142 Memorandum for Attorney General from David Barron, Acting Assistant Attorney General, *Withdrawal of Office of Legal Counsel Opinion* (Jun. 11, 2009), available at: www.justice.gov/olc/2009/memo-barron2009.pdf.

143 Executive Order 13491, *Ensuring Lawful Interrogations*, Jan. 22, 2009 [hereinafter: Executive Order 13491]. See *Executive Order: Interrogation*, USA TODAY (22 JAN. 2009), available at: www.usatoday.com/news/washington/2009-01-22-execorder-interrogation_N.htm.

144 See Dep't of Justice, Office of Legal Counsel, Memorandum for Alberto Gonzales, Counsel to the President from Jay Bybee, Assistant Attorney General, *Standards for Conduct for Interrogation under 18 U.S.C. 2340-2340A*, Aug. 1, 2002); Dep't of Justice, Office of Legal Counsel, Memorandum for Alberto Gonzales, Counsel to the President from John Yoo, *Interrogation of al Qaeda Operative*, (Aug. 1, 2002). See Dep't of Justice, Office of the Legal Counsel, Memorandum for William J. Haynes, General Counsel, Dep't of Defense from John C. Yoo, Deputy Assistant Attorney General, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, (Jan. 9, 2002).

145 JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

B3. Do the civilian investigative authorities, including criminal investigators, act independently or are they subject to the direction of the prosecutor or other actors in the justice system?

48. A statutory provision outlines the Attorney General's supervisory role stating, "the Attorney General shall supervise all litigation to which the United States... is a party, and shall direct all United States attorneys... in the discharge of their respective duties."¹⁴⁶ The DoJ has read this statute to grant "broad plenary authority" in all aspects of "litigation, including subpoena enforcement, settlement authority, and prosecutorial discretion."¹⁴⁷ Courts have also confirmed the supervisory function of the Attorney General as plenary.¹⁴⁸

49. Decisions to prosecute criminal cases lie primarily with the various United States Attorneys within the Department of Justice. Remarkably few restraints operate to limit U.S. Attorneys' discretion to pursue or drop criminal cases in the U.S. federal system. The United States Attorneys' Manual instructs U.S. Attorneys "to continue to exercise their discretion in a manner consistent with the best interests of society and the criminal justice system."¹⁴⁹ Exercises of prosecutorial discretion are extremely difficult to challenge in the U.S. federal system. Limitations on standing to bring suits, as well as the doctrine of separation of powers, make litigation challenging exercises of prosecutorial discretion very unlikely to succeed. U.S. courts give highly deferential review to challenges to U.S. Attorneys' exercise of prosecutorial discretion.¹⁵⁰

B4. What, if any, safeguards are in place (under law, regulation, policy or

¹⁴⁶ 28 U.S.C. § 519.

¹⁴⁷ *The Attorney General's role as chief litigator for the United States*, 6 O.L.C. 47 (1982)

¹⁴⁸ *Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668 (5th Cir. 1978); *F.T.C. v. Guignon*, 390 F.2d 323 (8th Cir. 1968); *Tecom Industries, Inc. v. U.S.*, 24 Cl.Ct. 611 (1991).

¹⁴⁹ U.S. ATTORNEYS' MANUAL, *infra* note 293, at § 9-8.190.

¹⁵⁰ *See United States v. Armstrong*, 517 U.S. 456 (1996); *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965).

practice) to ensure the independence and impartiality of the various actors in the civilian justice system who might be involved in investigating or prosecuting possible LOAC violations? Is there any relevant case law?

50. Following concern over the removal of several U.S. Attorneys, possibly on political grounds,¹⁵¹ Congress passed and the President signed the Preserving United States Attorney Independence Act of 2007.¹⁵² The Act limits the terms of interim U.S. Attorneys ensuring the regular process of Senate confirmation to guarantee U.S. Attorney nominees' independence from political pressure within the Executive branch. Additionally, federal prosecutors enjoy the general protections of the civil service merit system.¹⁵³ The merit system guarantees federal employees fair and equitable treatment, retention "on the basis of the adequacy of their performance," and protection from reprisal for lawful disclosures of information including reports of mismanagement and violations of law.¹⁵⁴

B5. If a matter is subject to a public inquiry and a criminal investigation how is the matter handled (criminal first/concurrent investigation, etc.)?

51. Matters subject to both public inquiries and criminal investigations are handled concurrently in the U.S. legal system. In some circumstances inquiries into LOAC violations gain political support. The United States Congress has authority to engage in oversight of the Executive Branch, based on the United States Constitution.¹⁵⁵ Congress enjoys the power to "make Rules for the Government and Regulation of land and naval Forces."¹⁵⁶ The Supreme Court of the United States has also recognized the authority

151 See James K. Robinson, *Ideas for a New Administration: Restoring Public Confidence in the Fairness of the Department of Justice's Criminal Justice Function*, 2 HARVARD L. & POL. REV. 237, 242 (2008).

152 Pubic Law 110-34.

153 See 5 U.S.C. § 2301(b)(1)-(9).

154 *Id.*

155 Frederick M. Kaiser, *Congressional Oversight* 1 (2006), available at: www.fas.org/sgp/crs/misc/97-936.pdf.

156 U.S. Const., art. I, § 8.

of Congress's oversight function in both the Senate and the House.¹⁵⁷ Congress has adopted statutes and rules requiring its bodies to engage in specific forms of oversight. For instance, "Each standing committee of the Senate and the House of Representatives shall review and study, on a continuing basis, the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee."¹⁵⁸

52. The form of oversight varies between bodies of Congress. The Senate Armed Services Committee, for example, has no specific rule requiring oversight. The House, however, requires its committees to oversee the areas within their jurisdiction.¹⁵⁹ Recently, the House Armed Services Committee of the 110th Congress stated, "the military tribunals and the detainees at Guantanamo Bay and elsewhere raise a number of critical issues that fall within the jurisdiction of the committee."¹⁶⁰ Additionally the Committee stated it would "conduct thorough oversight of, among other things, the possible implications of members of the armed services in alleged incidents of detainee abuse."¹⁶¹ The specific language used by the 110th Congress was changed in the oversight plans for the 111th Congress, stating that it would "take other necessary actions and conduct related oversight."¹⁶²

53. Congressional inquiries into war crimes accusations have been used only rarely.¹⁶³ Congressional oversight of U.S. war crimes at My

157 See *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) (stating that inquiry is a necessary and essential legislative function); *Watkins v. United States*, 354 U.S. 178, 187 (1957) (stating, "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing law as well as proposed or possibly needed statutes... But broad as is this power of inquiry, it is not unlimited.").

158 2 U.S.C. § 190d.

159 Rules of the United States House of Representatives. Rule X, cl. 2(b)(2).

160 U.S. House of Representatives, House Armed Services Comm., Oversight Plan for the 110th Congress, available at: <http://armedservices.house.gov/oversight110.shtml>.

161 *Id.*

162 U.S. House of Representatives, House Armed Services Comm., Oversight Plan for the 111th Congress, available at: http://armedservices.house.gov/oversight_plan.shtml.

163 Samuel Brenner, "I am a bit Sickened": Examining Archetypes of Congressional War Crimes Oversight After My Lai and Abu Ghraib. 205 MIL. L. REV. 1, 7 (2010).

Lai and Abu Ghraib mark two examples of such investigations.¹⁶⁴ War crimes investigations by Congress are highly politicized. As two scholars argue, political climate and individual agendas play determinative roles.¹⁶⁵ Although it is foreseeable that concerns of perceived unlawful command influence or taint of military panel (jury) pools could result from Congressional investigations, the My Lai and the Abu Graib hearings did not erect significant barriers to criminal prosecution in either case.

B6. Are there specific laws applicable to members of civilian security services? If so, please briefly describe them.

54. Civilian government actors are subject to several specific statutes providing for prosecution under United States law. First, a recent amendment to the UCMJ permits trial of civilians accompanying the force, not only in wartime, but also in “a contingency operation[s].”¹⁶⁶ The amendment could be used to prosecute civilian government actors’ violations of LOAC. A recent Directive Type Memorandum provides guidance concerning operation of the amendments against civilian personnel.¹⁶⁷ Other violations of the UCMJ by government actors not amounting to war crimes could also be prosecuted under the amendment. It is likely the scope of government actors covered would be broad. The key interpretive point regards the term “accompanying the force.” To date, the amendments have not been used to prosecute any persons directly

¹⁶⁴ *Id.* at 4.

¹⁶⁵ *Id.* at 92; *See also* LINDA L. FOWLER AND SETH HILL, PRESENTATION AT THE ANNUAL MEETING OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION, GUARDING THE GUARDIANS: SENATE OVERSIGHT ACTIVITY IN FOREIGN AFFAIRS, 1947-2004 (2006) (stating ideological polarization can extend to relations with the executive branch and that sophisticated political parties can use various means to claim success).

¹⁶⁶ 10 U.S.C. § 802(a)(10) as amended by The National Defense Authorization Act of 2007. The Act defines a “contingency operation” as a military operation designated by the Secretary of Defense as one in which participant are or may become involved in military actions, operations, or hostilities or that results in an order preventing active duty service members from separating from service. 10 U.S.C. § 101(a)(13).

¹⁶⁷ Department of Defense, Office of General Counsel, Directive-Type Memorandum 09-015, *Policy and Procedures Applicable to DoD and United States Coast Guard Civilian Personnel Subject to Uniform Code of Military Justice Jurisdiction in Time of Declared War or Contingency Operation*. (Feb. 16, 2010 with change 1 dated Aug. 19 2010).

employed by the U.S. government. The legislative record shows Congress clearly had private security contractors (PSCs) in mind when drafting the amendment. The military recently prosecuted a civilian Canadian-Iraqi interpreter for aggravated assault in Iraq under these provisions.¹⁶⁸ The constitutionality of these provisions remains in doubt, however.¹⁶⁹

55. Second, PSCs may be prosecuted under the Military Extraterritorial Jurisdiction Act of 2000 (MEJA). The Act covers conduct committed outside the United States punishable by more than a year by the members of or persons accompanying the armed forces.¹⁷⁰ Congress amended MEJA in 2004 to include private security and military contractors more broadly.

56. Two cases relating to war crimes allegations in Iraq have surfaced under MEJA, both involving members of the armed forces discharged prior to discovery of their offenses. Although not involving PSCs, the cases illustrate how relevant statutory schemes might operate against PSCs. First, a former Marine, Jose Luis Nazario, Jr., was indicted in June 2007 for killing four unnamed civilians in Fallujah, Iraq.¹⁷¹ At trial, prosecutors presented testimony from former military personnel, as well as polygraph evidence.¹⁷² Nazario was ultimately acquitted, causing significant debate in the United States and abroad regarding the effectiveness of the civilian courts in response to military crimes.¹⁷³

168 *United States v. Ali*, Docket No. Army 20080559 (Jun. 22, 2008). In March 2010, the Army TJAG directed the Army Court of Criminal Appeal to determine whether the court-martial had subject matter and personal jurisdiction in the case. See CRIMINAL LAW DESKBOOK, *infra* note 230, at D-15.

169 See discussion response C.6., *infra*.

170 18 U.S.C. § 3261 (2000): “Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States (1) while employed by or accompanying the Armed Forces outside the United States; or (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense”.

171 Indictment, *United States v. Nazario*, CR07-00127-SGL, (Sep. 4, 2007), available at: www.haguejusticeportal.net/Docs/NLP/US/Nazario_Indictment_4-9-2007.pdf.

172 See generally The Hague Justice Portal, DomCLIC Project, *United States of America v. José Luis Nazario Jr.*, available at: www.haguejusticeportal.net/eCache/DEF/9/707.html.

173 Catherine Elsworth, *U.S. Marine Acquitted of War Crimes in Ground-Breaking Trial*, The TELEGRAPH (Aug. 29, 2008), available at: www.telegraph.co.uk/news/worldnews/middleeast/iraq/2641186/US-marine-acquitted-of-war-crimes-in-ground-breaking-trial.html.

57. Federal prosecutors also used MEJA to bring charges against a former soldier, Steven Green, for the alleged rape and murder of an Iraqi girl and her family.¹⁷⁴ Green was tried in the federal Western District of Kentucky, in civilian court, because, like Nazario, he had been previously administratively discharged from the military as a matter of routine. On May 21, 2009, Green was convicted of rape, conspiracy, and multiple counts of murder.¹⁷⁵ On September 4, 2009, the court sentenced Green to five consecutive life sentences, without the possibility of parole.¹⁷⁶ Interestingly, Green's sentence may be significantly longer than it would have been under the military justice system.¹⁷⁷

58. The reach of several federal statutes extends to U.S. nationals at U.S. facilities overseas that qualify as part of the U.S. Special Maritime and Territorial Jurisdiction (SMTJ).¹⁷⁸ This category has been interpreted to include a wide variety of installations, such as safe houses used for detention and interrogation, prisons owned by foreign nations used by the United States, residences occupied by United States personnel foreign countries, and compounds used by United States international agencies.¹⁷⁹ Use of SMTJ has declined with the amendments made to MEJA in 2004, however, recent

174 Unreported (W.D. Ky. 2008). No. 5:06CR-19-R. 2008 W.L. 4000868.

175 *Ex-Soldier Gets 5 Life Sentences For Iraqi Rape*, CBS News (Sep. 5, 2009), available at: <http://cbs5.com/national/steven.green.iraqi.2.1166196.html>.

176 *Id.*

177 Interestingly, Green volunteered to reenlist in the military for the option to be prosecuted under the UCMJ. The military declined the option. Testimony had already developed in military court, because many of the co-conspirators, who were serving on active duty when the allegations arose and were already tried and convicted by court-martial. The UCMJ provides that convicted persons have a chance for parole after ten years, while this option is not always available under federal law. Some military law scholars suggest that prosecuting Green in federal district court "undoubtedly reflects political pressure to ensure the most severe punishment for the crime's alleged ringleader." Olivia Zimmerman Miller, *Murder or Authorized Combat Action: Who Decides? Why Civilian Court is the Improper Forum to Prosecute Former Military Service Members Accused of Combat Crimes*, 56 LOYOLA L. REV. 447, n.118 (citing Professor Gary Solis, a former military prosecutor and law professor at the United States Military Academy at West Point). See also Associated Press, *Iraq Rape-Slay Case Hits Snags*, CBS NEWS, Dec. 19, 2007 available at: www.cbsnews.com/stories/2007/12/19/iraq/main3631048.shtml.

178 18 U.S.C. § 7(9) (as amended by the § 804 of the USA P.A.T.R.I.O.T. Act, P.L. 107-56, title VIII, Oct. 26, 2001, 115 Stat. 377) (excluding persons covered by the Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261).

179 *Id.*

case law demonstrates how the United States could employ the statute.¹⁸⁰

59. In 2003, David Passaro, a CIA contractor at a military base in Afghanistan, beat Abdul Wali, a suspected terrorist, to death.¹⁸¹ In June 2004, prosecutors charged Passaro under SMTJ with assault with a dangerous weapon and assault resulting in bodily injury.¹⁸² He was sentenced to six years and seven months in April of 2010, following correction of a sentencing error.¹⁸³ Passaro was never tried for murder, involuntary manslaughter, or torture due to evidentiary difficulties.¹⁸⁴ This case is perhaps of particular significance for what it does not say. Namely, there was no account of DoJ's failure to use the War Crimes Act to prosecute Passaro. Some scholars concluded that this was a policy choice, intended to avoid creating legal precedent and to avoid prosecuting United States personnel for war crimes generally, however, no conclusive evidence supports this position.¹⁸⁵

60. Finally, it is foreseeable that U.S. government civilian employees' LOAC violations could be processed under the routine administrative systems governing their employment. Minor transgressions, or more serious actions for which inadequate evidence exists to support criminal prosecution, might be processed as violations of employment conditions. Typically such dispositions use streamlined administrative procedures and carry less significant consequences for employees than criminal prosecution, such as reprimand, reduction in grade. changes in duties or responsibilities, or dismissal.

180 18 U.S.C. § 7; 18 U.S.C. §§ 3261-3267 (2000 & Supp. IV 2004). Indictment at 1, *United States v. Passaro*, No. 5:04-CR-211-1 (E.D.N.C. 2004).

181 Indictment at 1-4, *United States v. Passaro* (2004).

182 *Id.* at 1-4.

183 Mandy Locke, *Passaro Sentence is Cut*, NEWS & OBSERVER (RALEIGH, N.C.) (Apr. 7, 2010), available at: www.newsobserver.com/2010/04/07/425210/passaros-sentence-is-cut.html#storylink=misearch.

184 Susan Schmidt & Dana Priest, *Civilian Charged in Beating of Afghan Detainee*, WASH. POST (Jun. 18, 2004) [hereinafter: Schmidt & Priest]; Scott Shane, *C.I.A. Contractor Guilty in Beating of Afghan Who Later Died*, NY TIMES (Aug. 18, 2006) [hereinafter: Shane].

185 Anthony Giardino, *Using Extraterritorial Jurisdiction to Prosecute Violations of the Law of War: Looking Beyond the War Crimes Act*, 48 B.C. L. REV 699, 725 (2007).

C. THE MILITARY JUSTICE SYSTEM

C1. *What breaches of LOAC fall under military law?*

61. A dated, though technically operative, definition of war crimes suggests that all LOAC breaches fall under U.S. military law. The U.S. Army Field Manual for the Law of Land Warfare states, “Every violation of the law of war is a war crime.”¹⁸⁶ Read in conjunction with the UCMJ’s extremely broad jurisdiction concerning offenses triable under the law of war, it seems nearly any law of war violation could be tried at general court-martial.¹⁸⁷

62. In practice, however, it is more common for breaches of LOAC to fall under military law according to severity or seriousness.¹⁸⁸ Minor or technical breaches are likely to be handled under administrative processes. All military leaders are empowered to prescribe retraining or corrective processes related to such deficiencies in conduct. Commanders may also initiate more formal administrative procedures resulting in reassignment, changes in duties, or reduction in rank of lower enlisted persons.

63. Serious breaches of LOAC are likely to be addressed simultaneously through administrative and criminal processes. Administrative measures such as suspension from consideration for awards, schooling, and promotion frequently accompany court-martial charges.¹⁸⁹ The UCMJ includes procedures and charges capable of addressing acts constituting breaches of LOAC. For instance, the UCMJ grants courts-martial jurisdiction “to try

¹⁸⁶ LAW OF LAND WARFARE, *supra* note 9, at para. 499.

¹⁸⁷ See 10 U.S.C. § 818.

¹⁸⁸ For example, one might imagine circumstances in which a U.S. P.O.W. camp commander failed to post copies of the 1949 Third Geneva Convention in the language of the prisoners. Although a technical violation of Article 41 of the Third Convention, it is highly unlikely such a breach would be regarded as a war crime in the U.S. military justice system.

¹⁸⁹ Administrative measures such as suspension from consideration for awards, schooling, and promotion frequently accompany court-martial charges. See *e.g.* ARMY ENLISTED SEPARATIONS, *supra* note 20, at para. 1-8.

any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment authorized by the law of war.”¹⁹⁰

C2. What options are available under military law for the investigation of possible LOAC violations (e.g., criminal investigations, boards of inquiry, operational command or unit level investigations)?

64. Rules for Court-Martial (R.C.M.) direct military commanders to make a preliminary inquiry into all charges or suspected offenses against the UCMJ.¹⁹¹ Preliminary inquiries are typically informal, conducted by the commander personally or by a member of the command. Most U.S. military units do not have extensive resources for or experience in complex investigations. The R.C.M. cautions commanders to seek law enforcement assistance in serious or complex cases.¹⁹² Thus, exclusive use of preliminary commander’s inquiries to investigate suspected violations is reserved for the simplest breaches of LOAC.

65. Military law enforcement organizations (MCIOs) conduct criminal investigations into serious war crimes. Typically, U.S. armed forces use MCIOs for serious, felony-level offenses.¹⁹³ Investigative agents of MCIOs are members of the armed forces, recruited from the ranks of lower non-commissioned officers with advanced educational qualifications and often with extensive policing experience. The various MCIOs enjoy a level of investigative autonomy through separate reporting chains, usually to their respective service Chiefs of Staff and Secretaries. Decisions to investigate rest primarily with commanders of MCIOs.¹⁹⁴ Operational commanders

¹⁹⁰ 10 U.S.C. § 818.

¹⁹¹ MANUAL OF COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2008) [hereinafter: MCM].

¹⁹² *Id.*

¹⁹³ Department of Defense, Instruction 5505.3, *Initiation of Investigations by Military Criminal Investigative Organizations* (Jun. 21, 2002). The Instruction identifies three MCIOs: The U.S. Army Criminal Investigation Command; the Naval Criminal Investigative Service; and the Air Force Office of Special Investigations. *Id.* at para. 3.2.

¹⁹⁴ *Id.* at para. 6.1.

may not impede or interfere with investigations initiated by MCIOs, nor do MCIOs require outside command approval to investigate.¹⁹⁵ Commanders may lodge objections to MCIO investigations with the Secretary of their respective service. Commanders may request that MCIOs initiate criminal investigations, but such requests are not binding upon MCIO commanders.¹⁹⁶

66. War crimes investigations by MCIOs employ a number of specialized procedures. Policies and regulations establish extensive coordination requirements for agents and commanders in such cases.¹⁹⁷ For instance, the U.S. Army Criminal Investigative Division (CID) is required to coordinate war crimes investigations with the theater level commander and staff, the theater Provost Marshal, and with the relevant US Embassy.¹⁹⁸ Furthermore, investigative teams must report regularly to the U.S. Criminal Investigation Command in Washington, D.C.¹⁹⁹ A field manual instructs war crimes investigators to be alert to circumstances requiring transfer of investigative jurisdiction based on comparative expertise or political considerations.²⁰⁰

67. MCIOs are not involved in decisions regarding the disposition of matters discovered in their investigations. MCIOs do not have jurisdiction to convene courts-martial or to initiate any other adverse action against the subjects of their investigations. Typically, U.S. military commanders consider the information gathered by MCIOs in their decisions whether to initiate military disciplinary measures or adverse administrative actions. U.S. commanders retain great discretion in their charging decisions.

195 Department of Defense, Instruction 5505.03, *Initiation of Investigations by Defense Criminal Investigative Organizations* (Mar. 24, 2011), paras. 4.a. & Enclosure 2, para. 3.a.

196 *Id.* at Enclosure 2, para. 1.a.

197 See ARMY LAW ENFORCEMENT INVESTIGATIONS, *supra* note 10, at para. 18-7; DEPARTMENT OF THE ARMY, ARMY REGULATION 190-45, LAW ENFORCEMENT REPORTING, para. 8-2(b) (Mar. 20, 2007) (requiring reports of “serious incidents to Headquarters, Department of the Army) [hereinafter: ARMY LAW ENFORCEMENT REPORTING].

198 ARMY LAW ENFORCEMENT INVESTIGATIONS, *supra* note 10, at paras. 18-7, 18-8.

199 *Id.* at para. 18-10.

200 *Id.* at para. 18-18. The manual discusses transfer to international authorities such as the United Nations in cases of suspected genocide. *Id.*

Although higher commanders may themselves initiate charges where lower commanders decline to, they may not direct subordinate commanders to initiate charges in any case. Nor may higher commanders establish policies regarding types of offenses, such as LOAC violations, that must be charged under the UCMJ.

68. The U.S. system prescribes further investigative procedures for charges destined for courts-martial. The UCMJ requires that a pre-trial investigation precede all charges referred to a general court-martial, including war crimes.²⁰¹ The purpose of the investigation is to inquire into the truth of the charges and gather information to assist the commander's determination of disposition of the case.²⁰² Investigating officers are usually commissioned officers in the grade of Major or higher, appointed by a court-martial convening authority.²⁰³ Although the investigating officer need not have legal training, military lawyers may be used in serious or sensitive cases. These investigations resemble trials in many respects. Accused are entitled to counsel, to be present for witness testimony, and to cross-examine and call reasonably available witnesses.²⁰⁴ Investigating officers make recommendations on each charge, however, recommendations do not bind courts-martial convening authorities. Convening authorities retain complete discretion in the referral of charges to courts-martial.²⁰⁵ The only significant limitations on referral are superior commanders' power to withhold authority to themselves and the prohibition on commanders referring cases in which they are an "accuser," meaning they have either signed or sworn to the charges.²⁰⁶

69. The UCMJ also authorizes court-martial convening authorities

201 10 U.S.C. § 832.

202 MCM, *supra* note 191, at R.C.M. 405(a), discussion.

203 *Id.* at 405(d)(1) and discussion.

204 10 U.S.C. § 832(b).

205 MCM, *supra* note 191, at R.C.M. 601(b).

206 *Id.* at R.C.M. 601(c).

to initiate courts of inquiry.²⁰⁷ Courts of inquiry consist of three or more commissioned officers assisted by military legal counsel. Courts of inquiry enjoy subpoena power similar to that of courts-martial.²⁰⁸ Courts of inquiry make findings of fact but typically do not express opinions or make recommendations unless required by their convening orders. The U.S. military does not use courts of inquiry widely.

70. Apart from criminal and pre-trial investigations, military procedures exist for both formal and informal administrative investigation of LOAC violations. Administrative investigations are common for incidents involving losses or destruction of property. There is no joint publication governing DoD investigations. Instead, service-specific regulations generally prescribe procedures for administrative investigations.²⁰⁹ Procedures and appointing authorities vary by service. For example, the U.S. Army reserves authority to investigate hostile fire incidents resulting in death to general court-martial convening authorities who may delegate such authority no lower than the equivalent of a Brigade Commander.²¹⁰ Administrative investigations are often used to gather information for preliminary decisions on criminal charging or administrative corrective measures. Investigating officers are to operate impartially.²¹¹ Army investigations conducted in compliance with regulated procedures may be used at administrative boards convened to separate soldiers from active duty.²¹²

207 10 U.S.C. § 935.

208 MCM, *supra* note 191, at R.C.M. 703(3)(2)(C).

209 *See e.g.* DEP'T OF THE ARMY, ARMY REGULATION 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (Oct. 2, 2006) [hereinafter: ARMY PROCEDURES FOR INVESTIGATING OFFICERS]; DEP'T OF THE NAVY, JAGINST 5800.7C, THE MANUAL OF THE JUDGE ADVOCATE GENERAL (Jun. 20, 2007) with change 2 (Sep. 16, 2008). The U.S. Air Force has no general regulation or instruction governing command-directed administrative investigations. The Air Force relies on commanders' inherent authority to conduct investigations. *See* THE JUDGE ADVOCATE GENERAL'S SCHOOL, ADMINISTRATIVE AND CIVIL LAW DEP'T, 1 ADMINISTRATIVE LAW DESKBOOK, 4 (MAJ Derek Brown ed., Dec. 2010).

210 ARMY PROCEDURES FOR INVESTIGATING OFFICERS, *supra* note 209, at para. 2-1a(3).

211 *See id.* at para. 1-8.

212 *See id.* at para. 1-9a.

C3. *Can civilians be the subject of such investigations?*

71. Civilians may be subjects of the investigations described in response C.2. above. Civilians subject to the *in personam* jurisdiction of the UCMJ may be the subjects of military criminal investigations. A U.S. statute, however, prevents the military from performing law enforcement functions on non-federal property within the United States, likely limiting the capacity of the armed forces to investigate civilians more broadly.²¹³ An executive order also strictly limits U.S. forces' authority to collect intelligence on U.S. citizens, potentially restricting investigative authority over civilians as well.²¹⁴ However, regulations governing military administrative investigations clearly anticipate as subjects civilians with connections to the military such as employment.²¹⁵

C4. *Provide a general description of the structure of the military justice system and the role of military courts, prosecution authority (including any military AG/JAG or similar authority) and military police regarding the investigation and prosecution of breaches of LOAC?*

72. The U.S. military justice system relies on generally applicable procedures to investigate and prosecute breaches of LOAC. Very few criminal procedures are specific to processing suspected breaches of LOAC.²¹⁶

73. The Judge Advocates General of the various services supervise administration of the military justice systems in their respective services. Service regulations provide details of the operation of the military

213 18 U.S.C. § 1385, *Posse Comitatus Act*. Exceptions and exclusions are available in emergency situations. *Id.*

214 Executive Order 12333, *United States Intelligence Activities*, 46 Fed. Reg. 59941 (Dec. 4, 1981).

215 See e.g. ARMY PROCEDURES FOR INVESTIGATING OFFICERS, *supra* note 209, at para. 1-5.b.(5) (noting procedural requirements for investigating members of the army civilian senior executive service).

216 See ARMY LAW ENFORCEMENT INVESTIGATIONS, *supra* note 10, at para. 18-7; ARMY LAW ENFORCEMENT REPORTING, *supra* note 197, at para. 8-2(b).

justice system.²¹⁷ Local supervising military attorneys typically detail trial counsel as prosecutors in courts-martial and other military justice proceedings.²¹⁸ Judicial and trial defense functions, however, are separated from the chains of command responsible for prosecution. For example, the U.S. Army TJAG appoints a Chief Trial Judge who is responsible for the supervision and administration of the Army Trial Judiciary. A Chief of Trial Defense separately supervises and controls the trial and appellate defense counsel services of the U.S. Army. Military police and criminal investigators, have no role in decisions concerning prosecution of offenses. They are organized under rating chains separate from military lawyers, and in the case of MCIOs, are rated and report through chains of command insulated from local commanders.²¹⁹

74. The U.S. military justice system is primarily a tool for commanders to ensure good order and discipline within their units. Ultimately, commanders make the most important decisions in the U.S. military justice system. Legal advisors and investigators generally advise and recommend courses of action to commanders with respect to military justice. Commanders as low as battalion level are empowered to convene courts-martial. Generally, available punishment increases as the level or rank of the convening authority increases. Commanders are responsible for both preferral (signing and swearing) charges²²⁰ as well as referral (forwarding charges to a convened court-martial), although a commander who has preferred charges may not later refer those same charges to court-martial.²²¹

75. Command input continues following completion of trial. After trial,

217 See e.g. DEP'T OF THE ARMY, ARMY REGULATION 27-10, MILITARY JUSTICE (Nov. 16, 2005) [hereinafter: MILITARY JUSTICE].

218 *Id.* at para. 5-3.

219 See U.S. Army Criminal Investigation Command, *Frequently Asked Questions*, available at: www.cid.army.mil/faqs.html.

220 MCM, *supra* note 191, at R.C.M. 307(a).

221 *Id.* at R.C.M. 601(b).

commanders, in their capacity as court-martial convening authorities, advised by their Staff Judge Advocates, review records of trial,²²² hear matters in mitigation submitted by the accused,²²³ approve or disapprove findings and sentences,²²⁴ and generally execute sentences. Commanders may not raise sentences or impose findings of guilt, but they may reduce, suspend, or vacate sentences.²²⁵ They may also disapprove findings of guilt, effectively acquitting an accused. As the R.C.M. states, “The action to be taken on the findings and sentence is within the sole discretion of the convening authority.”²²⁶ Among interests traditionally taken into account in post-trial review by commanders are “the interests of justice, discipline, mission requirements, clemency, and other appropriate reasons.”²²⁷

C5. What is the basis for jurisdiction over LOAC breaches under military law (territoriality, nationality, passive personality, protective jurisdiction)?

76. The U.S. military justice system includes a detailed *in personam* jurisdictional scheme, organized by neither nationality nor passive personality.²²⁸ Instead, the UCMJ identifies several categories of person, regardless of citizenship, with various affiliations with the armed forces subject to court-martial.²²⁹ United States court-martial jurisdiction is also not territorial; jurisdiction is worldwide.²³⁰ Jurisdiction under the UCMJ does not require a connection between a subject’s acts and their military service. Courts-martial may try non-service related offenses.²³¹

222 *Id.* at R.C.M. 1104(a).

223 *Id.* at R.C.M. 1105.

224 *Id.* at R.C.M. 1107.

225 *Id.* at R.C.M. 1107-1109.

226 *Id.* at R.C.M. 1107(b)(1).

227 *Id.* at R.C.M. 1107(b)(1) discussion.

228 10 U.S.C. § 802.

229 10 U.S.C. § 802(a).

230 *See* United States v. Murphy, 50 M.J. 4 (1998); THE UNITED STATES ARMY JUDGE ADVOCATE GENERAL’S SCHOOL, CRIMINAL LAW DESKBOOK, D-1 (2011) [hereinafter: ARMY CRIMINAL LAW DESKBOOK].

231 *See* Solorio v. United States, 483 U.S. 435 (1987) (overruling prior “service-connection” test for offenses triable under the UCMJ).

C6. Who is subject to military law? Can military jurisdiction be exercised over civilians and if so under what circumstances?

77. Notable persons subject to military criminal jurisdiction include *inter alia*: members of the armed forces including reservists on active service; cadets and midshipmen; military retirees; prisoners of war; and persons accompanying or serving with the armed forces during war or contingency operations, including military contractors.²³² The *in personam* jurisdiction of courts-martial also includes “any person who by the law of war is subject to trial by a military tribunal...”²³³

78. A rich body of appellate military and civilian case law elaborates U.S. military criminal jurisdiction.²³⁴ The seminal case concerning extension of court-martial jurisdiction over civilians remains *Reid v. Covert*.²³⁵ In *Reid*, the United States Supreme Court overturned court-martial convictions of two civilians for murdering their military spouses overseas. The Court reasoned that military trials of civilians could not be justified in areas where active hostilities were not underway.²³⁶ The Court declined, however, to delineate a hard jurisdictional boundary between civilians and military tribunals, leaving open the possibility of military trial in other circumstances.²³⁷ An amendment to the UCMJ now permits trial of civilians accompanying the force not only in wartime but also in “a contingency operation.”²³⁸ The amendment will likely call on the Supreme Court to

232 10 U.S.C. § 802(a)(1)-(10).

233 10 U.S.C. § 818.

234 See e.g. *Toth v. Quarles*, 350 U.S. 11 (1955) (reversing court-martial conviction of discharged service member for murder committed while in service); *United States v. King*, 27 M.J. 327 (C.M.A. 1989) (announcing elements of effective discharge and termination of personal jurisdiction).

235 354 U.S. 1 (1957).

236 354 U.S. at 33-34.

237 345 U.S. at 22-23.

238 10 U.S.C. § 802(a)(10) as amended by The National Defense Authorization Act of 2007. The Act defines a “contingency operation” as a military operation designated by the Secretary of Defense as one in which participant are or may become involved in military actions, operations, or hostilities or that results in an order preventing active duty service members from separating from service; 10 U.S.C. § 101(a)(13).

revisit or clarify *Reid* at some point. The military recently prosecuted a civilian Canadian-Iraqi interpreter for aggravated assault in Iraq under these provisions.²³⁹

C7. What disciplinary or punitive actions can be taken when a violation of LOAC is determined to have occurred (e.g., censure, reprimand, discharge from service, imprisonment)?

79. The U.S. military legal system distinguishes administrative corrective measures from disciplinary and punitive measures. All military leaders may impose administrative corrective measures. Administrative corrective measures promote good order and discipline and include “counseling, admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, rebukes, extra military instruction, and administrative withholding of privileges.”²⁴⁰ Only commanders and courts-martial may impose disciplinary and punitive measures.²⁴¹

80. The U.S. military legal system also authorizes commanders to impose non-judicial punishment (NJP).²⁴² The Manual for Courts-Martial (MCM) describes NJP as “a disciplinary measure more serious than... administrative corrective measures... but less serious than trial by court-martial.”²⁴³ Commanders may impose NJP for minor offenses under the punitive articles of the UCMJ.²⁴⁴ Whether an offense is considered minor depends on: “the nature of the offense and the circumstances surrounding its commission; the offender’s age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried

239 *United States v. Ali*, Docket No. ARMY 20080559 (Jun. 22, 2008). In March 2010, the Army TJAG directed the Army Court of Criminal Appeal to determine whether the court-martial had subject matter and personal jurisdiction in the case. See CRIMINAL LAW DESKBOOK, *supra* note 230, at D-15.

240 MCM, *supra* note 191, at Part V.1.g. (2008).

241 DEP’T OF THE ARMY, ARMY REGULATION 600-20, ARMY COMMAND POLICY, para. 4-7 (Mar. 18, 2008).

242 10 U.S.C. § 815.

243 MCM, *supra* note 191, at Part V.1.b.

244 *Id.* at Part V.1.e.

at court-martial.”²⁴⁵ Ordinarily, offences punishable at court-martial by no more than one year of confinement are considered minor.²⁴⁶ Thus, minor breaches of LOAC could be processed through NJP. Discretion whether an offense is minor rests entirely with the commander imposing discipline.²⁴⁷

81. Available punishment at NJP varies by the level of command imposing discipline and the rank of the accused.²⁴⁸ Typical punishments involve reduction in pay, extra duty, restriction, and, in the case of lower enlisted persons, reduction in rank. Service members, with the exception of those embarked on vessels, may decline NJP in favor of trial by court-martial.²⁴⁹ Commanders may impose NJP in addition to or in lieu of administrative corrective measures.²⁵⁰ Discipline by NJP does not bar later trial by court-martial for the same conduct.²⁵¹

82. Military legal policy discourages charging U.S. service members with war crimes at court-martial.²⁵² Instead, policy instructs prosecutors and commanders to charge service members with the underlying conduct of the war crime (e.g. murder, assault, theft, etc.).²⁵³ The policy greatly frustrates efforts to track U.S. military prosecution of war crimes.²⁵⁴

83. Finally, Article 18 of the UCMJ authorizes general courts-martial to

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*; Yet higher commanders may divest lower commanders of NJP jurisdiction over certain offenses or ranks of offenders. *See e.g.* ARMY MILITARY JUSTICE, *supra* note 217 para. 3-7d. (stating, “Any commander having authority under the UCMJ, Article 15, may limit or withhold the exercise of such authority by subordinate commanders.”)

²⁴⁸ *See* MCM, *supra* note 191, at Part V.5.

²⁴⁹ 10 U.S.C. § 815(a).

²⁵⁰ *Id.*

²⁵¹ 10 U.S.C. § 815(f).

²⁵² LAW OF LAND WARFARE, *supra* note 9, at para. 507 (stating, “The United States normally punishes war crimes as such only if they are committed by enemy nations or persons serving the interests of the enemy State”).

²⁵³ *Id.* (stating, “Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code”).

²⁵⁴ *See also* response D.10. *infra*.

try all persons subject to military trial under the laws and customs of war.²⁵⁵ The Rules for Court-Martial (RCM) further anticipate such trials under the traditions of the law of war.²⁵⁶ The MCM notes that such charging methods “remain underdeveloped.”²⁵⁷ Research revealed no instance of Article 18 charges at court-martial.

C8. Describe the leadership structure of the military legal system. If there is a military attorney general, JAG or equivalent person, what is the role of that individual? Does he/she provide advice to commanders, supervise the military legal system, oversee military justice? What are his/her authority within the military justice system and his/her relationship to military criminal investigators and other investigators?

84. The Judge Advocates General (TJAGs) lead the military legal corps of the various armed services. The service TJAGs’ authority and functions derive from statute.²⁵⁸ The TJAGs are responsible for the supervision and administration of military justice in the various services.²⁵⁹ The Judge Advocate General’s Corps (JAG Corps) typically provide legal services to the armed forces through field offices led by Staff Judge Advocates (SJA). Review of courts-martial is the primary TJAG oversight of military justice. The offices of the respective TJAGs review all general court-martial to ensure findings of guilt are supported in law and sentences are appropriate.²⁶⁰ An accused may waive TJAG review of his conviction.²⁶¹ TJAGs do not have formal oversight of MCIOs or other investigators.²⁶²

255 10 U.S.C. § 818.

256 See MCM, *supra* note 191, at A21-12 (analysis of R.C.M. 202 discussing R.C.M. 301(b), 302(c), 303(c) & 305(d).

257 *Id.*

258 See e.g. 10 U.S.C. § 5149(a)(1) (establishing the Judge Advocate General of the U.S. Navy appointed by the President); 10 U.S.C. § 3037 (establishing a Judge Advocate General of the U.S. Army appointed by the President).

259 See e.g. ARMY MILITARY JUSTICE, *supra* note 217, at para. 1-4.

260 10 U.S.C. § 869(a).

261 *Id.*

262 See *supra* response C.2. regarding supervision of Military Criminal Investigation Organizations.

85. Although JAGs are the primary source of LOAC advice to the armed forces, their advice may be supplemented or superseded by lawyers within the Department of Defense, such as the DoD General Counsel or, in rare instances, by the Department of Justice. Similarly, the Department of Justice may provide its own LOAC advice to other government agencies within the executive branch. Although the vast majority of LOAC policy and interpretations comes from the Department of Defense, specifically from the various JAG Corps, some determinations are made in consultation with other agencies such as the Department of State, with Department of Justice constituting the final arbiter for purposes of executive branch deliberations.

C9. To whom does the aforementioned person report? What authority does that superior exercise over him or her?

86. The Judge Advocates General of the various armed services typically report to the Chiefs of Staff of their respective services. The civilian General Counsels of the various services also exercise technical supervision of the respective offices of TJAGs.²⁶³

C10. What, if any, safeguards are in place (under law, regulation, policy or practice) to ensure the independence and impartiality of the various actors in the military who might be involved in the investigation or prosecution of alleged LOAC violations? Is there any relevant case law?

87. The primary safeguard against undue manipulations of investigations and prosecutions in the military justice system is the doctrine of unlawful command influence (UCI).²⁶⁴ Unlawful command influence is the improper use of authority to interfere with the military justice process.²⁶⁵ The

²⁶³ See e.g. Office of the Army General Counsel, *Welcome*, available at: <http://ogc.hqda.pentagon.mil>.

²⁶⁴ See 10 U.S.C. § 37(a).

²⁶⁵ See ARMY CRIMINAL LAW DESKBOOK, *supra* note 230, at C-1 (citing 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE, §18-28.00 (2d ed. 1999)).

most common targets of UCI are subordinate commanders, panel (jury) members, and potential witnesses to offenses. The threshold for a UCI challenge is quite low. A challenge based on UCI need only present “some evidence” to succeed.²⁶⁶ Military courts have found UCI in circumstances that merely “give the appearance” of improperly influencing proceedings.²⁶⁷ With respect to subordinate commanders, the purpose of UCI doctrine is to preserve the independence and exercise of personal judgment in military disciplinary proceedings. Thus, commanders may not order subordinates to adopt specific dispositions of cases.²⁶⁸ The doctrine of UCI also prevents commanders from establishing blanket policies with respect to offenses or punishment.

88. A recent case demonstrates that UCI may extend to actions of staff members and to steps taken during investigations of war crimes. In *United States v. Chessani*, the Navy-Marine Corps Court of Criminal Appeals affirmed dismissal of charges of failure to accurately report and investigate alleged murders committed by marines at Haditha, Iraq.²⁶⁹ The court found that a military lawyer’s involvement in both investigation of the incident and later advice on charges to the convening authority tainted the proceedings against the accused battalion commander.²⁷⁰

89. U.S. law further insulates participants in court-martial from influence or retribution for performing their assigned roles. By statute, supervisors of military personnel may not use the panel (jury) members’ participation in that capacity in any fitness evaluation or efficiency report.²⁷¹ Military judge and defense counsel are evaluated by the respective Chiefs of their divisions and are insulated from influence of local commanders

²⁶⁶ See *United States v. Biagase*, 50 M.J. 143 (1999).

²⁶⁷ *United States v. Hawthorne*, 22 C.M.R. 83, 87 (C.M.A. 1956).

²⁶⁸ See ARMY CRIMINAL LAW DESKBOOK, *supra* note 230, at C-26.

²⁶⁹ NMCCA 200800299 (Mar. 17, 2009).

²⁷⁰ *Id.* at 19-21.

²⁷¹ 10 U.S.C. § 836(b).

and supervising military attorneys.²⁷² Military judges do not have tenure. They are assigned to judicial duties from the ranks of the services' uniformed military legal Corps. Although more common in some services than others, military judges may be reassigned to conventional operational legal assignments following service as a military judge. Finally, to ensure compliance with law, the Judge Advocates General of the services review the proceedings of courts-martial.²⁷³

C11. Do military investigative authorities act independently or are they subject to the direction of commanders, military legal officers, prosecutors or other actors?

90. Relationships between commanders and officers responsible for military investigations vary greatly by organization and function. Military criminal investigation organizations conduct the armed forces' most complex investigations into war crimes. Military criminal investigation organizations typically operate independently from the commands they support.²⁷⁴

91. Separate from MCIOs, provost marshals operate at most U.S. military installations and are frequently members of commanders' staffs. Provost marshals and Military Police (MP) investigators are assets of the installation or commander to whom they are assigned.²⁷⁵ Installation commanders may order initiation of MP criminal investigations.²⁷⁶ Thus, provost marshals and their MP organizations are comparatively less insulated from commanders and prosecutors than MCIOs.²⁷⁷ Provost

²⁷² See ARMY MILITARY JUSTICE, *supra* note 217.

²⁷³ See response C.8., *supra*. (citing 10 U.S.C. § 869(a)).

²⁷⁴ See response C.2., *supra* (discussing details on supervision of Military Criminal Investigation Organizations).

²⁷⁵ DEPARTMENT OF THE ARMY, ARMY REGULATION 190-30, MILITARY POLICE INVESTIGATIONS, para. 4-1 (Nov. 1, 1995) [hereinafter: ARMY MILITARY POLICE INVESTIGATIONS].

²⁷⁶ See *id.* at para. 4-3.

²⁷⁷ Compare MCIO ratings discussed at response C.2., *supra*.

marshals are responsible for active law enforcement operations and military facilities and thus may conduct investigations into crimes not rising in complexity or seriousness to warrant MCIO investigation.²⁷⁸

C12. What is the role of the commander or other senior military personnel with regard to a possible LOAC violation? Is their involvement limited in any way? Do they shoulder any particular responsibilities?

92. Commanders participate in nearly all facets of the disposition of possible LOAC violations. Commanders participate primarily through reporting,²⁷⁹ initiation of investigations,²⁸⁰ and decision making in the military justice system.²⁸¹ Involvement begins at the lowest level of leadership and extends to the highest levels of command in the U.S. armed forces. For instance, a pair of directives establishes DoD-wide reporting obligations for Combatant Commanders²⁸² in particular.²⁸³ Moreover, “on-scene commanders” are charged with a duty to preserve evidence of all suspected war crimes.²⁸⁴

C13. Is there civilian oversight over the military system and its various actors (e.g. courts, civilian attorney general)?

278 For an example of offenses investigated by Military Police rather than MCIOs *see id.* at Table 4-1.

279 See response D.2., *infra* (discussing U.S. military LOAC reporting requirements).

280 See response C.2., *supra* (discussing the role of the commander in military criminal and administrative investigations).

281 See response C.4., *supra* (discussing the role of the commander in the military justice system).

282 The term “Combatant Commanders” refers to U.S. commanders leading one of ten multi-service organizations under the Unified Command Plan (UCP). Updated in April 2011, the UCP establishes missions and responsibilities for combatant commands (COCOMs). Six COCOMs are responsible for operations in geographic regions of the world. For instance, United States Central Command is responsible for U.S. operations and security in Southwest Asia and Egypt. The remaining four COCOMs are responsible for particular U.S. missions globally. For example, United States Transportation Command is responsible for mobility and transport missions. See Department of Defense, *Unified Command Plan*, available at: www.defense.gov/home/features/2009/0109_unifiedcommand.

283 DoD Law of War Program, *supra* note 11, at para. 5.11 *et seq*; Chairman of the Joint Chiefs of Staff, Instruction 5810.01D, *Implementation of the DoD Law of War Program*, (Apr. 30, 2010) [hereinafter: *Implementation of Law of War Program*].

284 DoD Law of War Program, *supra* note 11, at para. 4.5.

93. Appellate review of courts-martial provides the primary civilian check on the military justice system. The highest military court of review is the Court of Appeals for the Armed Forces (CAAF). The CAAF consists exclusively of civilian judges, appointed for fifteen-year terms by the President of the United States. The CAAF reviews all cases adjudging a sentence of death²⁸⁵ and all cases reviewed by the various service Courts of Criminal Appeals referred to CAAF by a service TJAG.²⁸⁶ Additionally, persons convicted at courts-martial may petition for review of findings and sentences by the CAAF.²⁸⁷ Decisions of the CAAF are subject to review by the Supreme Court of the United States by writ of certiorari.²⁸⁸ Certiorari is discretionary review - cases are taken by nomination of at least four Justices of the Court.²⁸⁹ Further civilian oversight includes the Presidential pardon power,²⁹⁰ as well as *ad hoc*²⁹¹ and regular reports submitted to Congress by DoD.²⁹²

285 10 U.S.C. § 67(a)(1).

286 10 U.S.C. § 67(a)(2).

287 10 U.S.C. § 67(b).

288 10 U.S.C. § 67a.

289 28 U.S.C. § 1259.

290 U.S. Constitution, Art. II, sec. 2.

291 See e.g. DEPT OF DEFENSE, FINAL REPORT TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR (Apr. 1992) (implementing mandate for a report on the 1991 Persian Gulf conflict); The Final Report includes a section on the law of war. *Id.* at Appendix O.

292 See Annual Report Submitted to the Committees on Armed Services United States Senate and United States House of Representatives and to the Secretary of Defense, Secretary of Homeland Security, and Secretaries of the Army, Navy, and Air Force Pursuant to the Uniform Code of Military Justice for the Period October 1, 2009 to September 30, 2010, *available at*: www.armfor.uscourts.gov/newcaaf/ann_reports.htm [hereinafter: UCMJ ANNUAL REPORT TO CONGRESS].

D. APPLICATION OF THE POLICY IN PRACTICE

D1. If the military and civilian systems both have authority over incidents involving possible LOAC violations, what are the criteria used to determine which system handles the matter? Specifically, explain the interface between civilian and military systems in the investigation and prosecution of alleged breaches of LOAC.

94. The Attorney General's broad statutory discretion permits prosecution of cases involving military personnel.²⁹³ Self-restraint, in the form of informal agreements, is the most significant limit on DoJ prosecutorial discretion.

95. The DoJ and DoD have concluded agreements regulating prosecutions of military personnel for violation of federal laws.²⁹⁴ In August 1984, DoD and DoJ concluded an agreement whereby the Attorney General effectively relinquished prosecutorial discretion over federal crimes involving military personnel. Under the agreement, the military prosecutes most federal crimes committed by military personnel.²⁹⁵ The United States Attorney's Manual ("USAM") confirms, however, that DoJ and DoD have concurrent jurisdiction over prosecution of federal crimes by service members.²⁹⁶ The USAM cites MOU 669 as the primary source confirming this concurrent authority.²⁹⁷ MOU 669 also includes instructions on resolution of prosecutorial disputes, instructing that in most circumstances, the military justice system will be granted prosecutorial discretion.²⁹⁸ MOU 669 states

293 See UNITED STATES ATTORNEYS' MANUAL 9-20.115 (2010) [hereinafter: U.S. ATTORNEYS' MANUAL].

294 *Memorandum of Understanding between the Departments of Justice and Defense relating to the Investigation and Prosecution of Certain Crimes*, (1984), available at MCM, *supra* note 191, at App. 3, (2008) [hereinafter: MOU 669].

295 *Id.* at 2-3.

296 See U.S. ATTORNEYS' MANUAL, *supra* note 293, at ch. 9-20.115 & 9-20.116. See also Department of Defense, Instruction 5525.7, *Implementation of Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes*, (Jun. 18, 2007) [hereinafter: *DoJ-DoD MOU Implementation Instruction*].

297 *Id.*

298 *Id.*

DoJ will not prosecute certain federal crimes against military personnel, and instead serves a referral role to be used when DoD deems necessary.²⁹⁹

96. The Departments have also concluded a separate agreement concerning investigative practices. Memorandum of Understanding 938 states the FBI will yield its duty to investigative to the authority of the military justice system.³⁰⁰ Military authorities investigate crimes occurring on military installations, other than corruption.³⁰¹ Additionally federal crimes by service members that occur off military installations fall under military investigative jurisdiction unless the crime alleged is an offense not normally tried by court-martial.³⁰² If the alleged crime is “reasonably believed” to be a federal crime “not normally tried by court-martial” then DoD refers the case to DoJ for investigation and prosecution.³⁰³ This provision seems to indicate that following a referral the FBI retains investigative authority to search for a violation of federal law, per its statutory authority.³⁰⁴

97. The FBI leads investigations of LOAC violations referred to DoJ by DoD.³⁰⁵ An example of such referral is *United States v. Green*. In *Green*, the Army Criminal Investigative Division requested assistance and turned over investigation of charges against Green to the FBI.³⁰⁶ A warrant was issued for the arrest of Green on June 30, 2006 using the Military Extraterritorial Jurisdiction Act (“MEJA”).³⁰⁷

299 *Id.*

300 Dep’t of Defense Memorandum of Understanding 938, Memorandum of Understanding between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes, Aug. 1984, *available at*: www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00938.htm.

301 *Id.* at para. (2).

302 *Id.* at para. (3)(b).

303 *Id.*

304 *Id.*; *See also* 28 C.F.R § 0.85.

305 *See e.g.* Warrant for Arrest at 4, *United States v. Green*, No. 3:06-MJ-00230, *available at*: www.kywd.uscourts.gov/3-06-00230/DocketSheet.htm.

306 *Id.*

307 *Id.*

98. In addition to MOU 938, the DoJ has released statements from then Deputy Attorney General of the Criminal Division indicating that the FBI generally will not have lead investigative authority, even in instances where MEJA is concerned.³⁰⁸ The DoJ concludes that the FBI will likely not have lead investigatory status because most MEJA cases are initially investigated overseas by DoD or the Department of State.³⁰⁹ The DoJ has concluded that the FBI “may participate in certain investigations” if the investigation is particularly “complex or serious.”³¹⁰ The DoJ position indicates a general policy to yield investigative authority to the military even in instances of non-LOAC violations.

99. As a matter of policy, the military criminal justice system does not process acts for which military personnel have been tried in civilian court.³¹¹ Yet the policy appears to be discretionary rather than legally required, making prosecution in each separate system theoretically possible.³¹²

D2. What are the reporting requirements regarding allegations of wrongdoing (e.g. are allegations reported, to what authority and in what time period)?

100. Rules for Court-Martial state, “any military authority who receives a report of an offense shall forward as soon as practicable the report and any accompanying information to the immediate commander of the suspect.”³¹³ A DoD directive provides further LOAC-specific reporting guidance.³¹⁴ All military and civilian DoD personnel, including contractors

308 See Dep’t of Justice, *Closing Legal Loopholes: Prosecuting Sexual Assaults and Other Violent Crimes Committed Overseas by American Civilians in a Combat Environment*, available at: www.justice.gov/criminal/hrsp/pr/testimony/2008/04-09-08nelson-hearing.pdf.

309 *Id.*

310 *Id.*

311 See ARMY CRIMINAL LAW DESKBOOK, *supra* note 230, at D-2.

312 See MILITARY JUSTICE, *supra* note 217, at para. 4-2.

313 MCM, *supra* note 191, at R.C.M. 301(b).

314 DoD Law of War Program, *supra* note 11.

are required to report suspected LOAC violations through their chains of command.³¹⁵ All commanders must report suspected LOAC violations through their operational chain of command as well as to their respective service department.³¹⁶ Combatant Commanders are required to notify the Chairman of the Joints Chiefs of Staff, the Secretary of Defense, and the Secretary of the Army in his capacity as DoD Executive Agent for suspected war crimes.³¹⁷ Additionally, suspected LOAC violations must be reported to: the DoD General Counsel; the Assistant Secretary of Defense (ASD) for Public Affairs; Under Secretary of Defense (USD) for Policy; the USD for Intelligence; the ASD for Legislative Affairs; and the DoD Inspector General.³¹⁸

101. Reports of suspected LOAC violations must be made “through the most expeditious means available.”³¹⁹ The U.S. Army Special Assistant for Law of War Matters advises military lawyers that the reporting standard is intended to be over-inclusive.³²⁰ Elaborating on the reporting standard, he advises:

Information, although incomplete, is deemed credible when considering the source and nature of the information and totality of the circumstances the information leads a prudent person to suspect that a law of war violation may have occurred and investigate the allegation further. These verity of the alleged offense, the source of the information, and corroboration (if any) are all factors to consider in determining whether the allegation is credible. In case of doubt, the information must be presumed credible.³²¹

315 *Id.* at para. 6.3.

316 *Id.* at para. 6.4.

317 *Id.* at para. 6.6.

318 *Id.* at para. 6.7.

319 *Id.* at para. 6.4.

320 Dick Jackson, *Reporting and Investigation of Possible, Suspected, or Alleged Violations of the Law of War*, THE ARMY LAWYER 95, 98 (Jun. 2010).

321 *Id.*

He advises further, “when in doubt, report”.³²²

An instruction from the Chairman of the Joint Chiefs of Staff adds to the DoD directive, emphasizing that reports must be made through both criminal and command channels.³²³

102. The U.S. Army provides additional law enforcement reporting requirements. A regulation categorizes war crimes as “Category 1 serious incidents,” requiring reports through law enforcement channels with copies for commanders and legal advisors at each level, to Headquarters, Department of the Army.³²⁴ The regulation specifically enumerates war crimes such as “mistreatment of enemy prisoners of war, detainees, displaced persons, retained persons, or civilian internees; violations of the Geneva Conventions; and atrocities”.³²⁵

D3. Can complaints of alleged LOAC violations be made directly to the military or the civilian police?

103. A DoD directive permits members of the armed forces to report suspected LOAC violations to military police in addition to or as an alternative to their chains of command.³²⁶ DoD personnel may also report LOAC violations to a judge advocate or an inspector general.³²⁷ No policy or procedure prevents reporting LOAC violations to civilian police.

D4. What is the policy regarding investigation of an alleged LOAC violation by military personnel? Who decides whether an operational inquiry (e.g. by unit military personnel) or criminal investigation is conducted?

³²² *Id.*

³²³ *Implementation of Law of War Program*, *supra* note 283, para. 6.f.(4)(a).

³²⁴ DEPARTMENT OF THE ARMY, REGULATION 190-45, LAW ENFORCEMENT REPORTING, para. 8-2b. (May 20, 2007).

³²⁵ *Id.*

³²⁶ *DoD Law of War Program*, *supra* note 11, para. 6.3.

³²⁷ *Id.* at para. 6.3.

104. Although U.S. law requires commanders to initiate preliminary investigations into all suspected violations of military law including LOAC, the same law cautions commanders to cease operational or administrative investigations in complex or especially serious cases.³²⁸ Commanders are instructed to refer such cases to MCIOs to initiate criminal investigations.³²⁹ Even MP assets are instructed to refer investigation of serious criminal activity to MCIOs.³³⁰

105. A Chairman of the Joints Chief of Staff instruction orders commanders to take the following steps with respect to suspected LOAC violations by DoD personnel:

1. Upon obtaining information about a reportable incident alleged to have been committed by its command personnel, the commander of the unit shall conduct a preliminary inquiry.
2. If it is determined that U.S. personnel may be involved in or responsible for a reportable incident, the commander shall initiate a formal investigation by command investigation in accordance with Service regulations, and shall at the same time notify the cognizant military criminal investigative organization (MCIO). The MCIO will be responsible for subsequent criminal incident reporting, as appropriate, under the provisions of reference (b) and service directives.
3. If warranted, the commander of the unit or superior commanders, as appropriate, shall take action in response to the results of the investigation(s), or refer the matter to a commander who can take action.³³¹

Army Regulation 15-6 provides an example of the command investigative

³²⁸ MCM, *supra* note 191, R.C.M. 303.

³²⁹ *Id.*; DoD Law of War Program, *supra* note 11.

³³⁰ For a delineation of offenses investigated by Military Police rather than MCIOs *see* ARMY MILITARY POLICE INVESTIGATIONS, *supra* note 275, at Table 4-1.

³³¹ *Implementation of Law of War Program*, *supra* note 283, paras. 6.f.(4)(e)(1)-(3).

procedures referred to in paragraph 2 of the above excerpt. Army Regulation 15-6, Chapter 5 outlines the procedural requirements of formal investigations, also referred to as “Formal Boards of Officers.” Entitlement to counsel is one of the important procedural protections afforded to respondents to formal investigations.³³² In practice, such procedures might be used to precede or compliment parallel criminal investigations, although criminal investigations enjoy primacy over their administrative counterparts.

D5. Regarding such investigations, what are the criteria to launch an investigation or other inquiry (e.g. reasonable suspicion, belief that an offence has been committed, etc.)?

106. A DoD directive establishes criteria for reporting and initiation of investigations. The directive states, “All reportable incidents committed by or against U.S. personnel, enemy persons, or any other individuals are reported promptly, investigated thoroughly, and where appropriate, remedied by corrective action.”³³³ The directive defines a “reportable incident” as a “possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.”³³⁴ Guidance notwithstanding, the directive entrusts commanders with a great deal of discretion regarding the ultimate disposition of potential LOAC violations.

D6. If during an operational investigation or other inquiry by the chain of command it appears that a crime may have been committed, is it required that the matter be referred for criminal investigation? If so, under what circumstances?

³³² See ARMY PROCEDURES FOR INVESTIGATING OFFICERS, *supra* note 209, para. 5-6.a.

³³³ DoD Law of War Program, *supra* note 11, at para. 4.4.

³³⁴ *Id.* at para. 3.2. See also response D.2 *supra*.

107. If an operational inquiry or administrative investigation reveals possible criminal activity, commanders and investigating officers are instructed to consult a legal adviser.³³⁵ Although such suspicion must be reported through required channels, a service-specific regulation on administrative investigations does not preclude concurrent administrative and criminal investigations into the same incident or activity.³³⁶ However, criminal investigations by MCIOs enjoy primacy over administrative investigations when conflicts arise.³³⁷

D7. What circumstances in cases involving civilian death or injury or damage to civilian property require that an investigation or inquiry be conducted? Is there a requirement that every death or every civilian death be investigated? Is this a legal requirement or one of policy? Does it extend to cases in which a military objective is attacked and collateral damage or incidental injury occurs?

108. Generally, standing DoD investigative policies do not state requirements by type of incident or consequence. Rather, suspicion of a violation of the law of war typically triggers U.S. investigations and reporting requirements.³³⁸ Commanders, particularly Theater and Combatant Commanders, however, have supplemented DoD investigation and reporting requirements through orders to their forces. For instance, in 2000, U.S. Central Command issued a regulation reiterating investigative and reporting requirements. Additionally, a U.S. media account relates that in 2006, the Deputy Commander of U.S. forces in Iraq issued an order requiring investigations of “any use of force against Iraqis that resulted in death, injury, or property damage greater than \$10,000.”³³⁹ Though

335 See e.g. ARMY PROCEDURES FOR INVESTIGATING OFFICERS, *supra* note 209, at para. 2-3b.

336 ARMY PROCEDURES FOR INVESTIGATING OFFICERS, *supra* note 209, at para. 1-5d.

337 Department of Defense, Instruction 5505.03, *Initiation of Investigations by Defense Criminal Investigative Organizations* (Mar. 24, 2011), at para. 4.b.

338 See DoD Law of War Program, *supra* note 11, at para. 4.4.

339 Robert F. Worth, *U.S. Military Braces for Flurry of Criminal Cases in Iraq*, N.Y. TIMES (Jul. 9, 2006).

not publicly available, there is a strong possibility that commanders have issued such orders and fragmentary orders concerning investigation and reporting of specific incidents in other theaters as well. It should be noted that such orders appear to have been developed as a matter of policy rather out of any sense of legal obligation.

D8. What access do affected civilians, including non-citizens and residents of other countries, have to the investigation, its results and any court proceedings?

109. Persons named as “interested persons” or “respondents” to military administrative investigations are entitled to copies of investigative materials.³⁴⁰ Members of the public may receive copies of military investigations through requests submitted under the Freedom of Information Act (FOIA).³⁴¹ The Act includes provisions that permit government agencies to deny release for various reasons including privacy,³⁴² national security,³⁴³ and protection of properly classified materials.³⁴⁴ The DoD has released copies, though usually redacted, of a number of investigations of suspected LOAC breaches under FOIA.³⁴⁵

D9. What role, if any, do human rights groups have in initiating or conducting any inquiry into alleged LOAC violations?

110. Generally speaking, human rights groups and non-governmental organizations (NGOs) have no formal role in initiating or conducting inquiries into alleged violations. Information provided by NGOs may, however, put a commander on notice of a suspected violation sufficient

³⁴⁰ See e.g. ARMY PROCEDURES FOR INVESTIGATING OFFICERS, *supra* note 209, at paras. 4-3 & 5-4 - 5-5.

³⁴¹ 5 U.S.C. § 552.

³⁴² 5 U.S.C. § 552(b)(6).

³⁴³ 5 U.S.C. § 552(b)(1)(A).

³⁴⁴ 5 U.S.C. § 552(b)(1)(B).

³⁴⁵ See e.g. response D.12.h., *infra* (relating information from investigation obtained by FOIA).

to trigger the duty to report and/or investigate as appropriate. The International Committee of the Red Cross (ICRC), by virtue of access granted to detention facilities and the battlefield, may provide such notice through its confidential reports to commanders. ICRC reports receive special attention in the U.S. DoD and must be forwarded to the Office of the Secretary of Defense.³⁴⁶

D10. Please provide available statistics regarding the investigations or other inquiries and prosecutions of alleged LOAC violations (e.g. numbers of complaints, matters investigated, charges laid, non-judicial action, trials, verdicts – please include civil and military).

111. The U.S. DoD does not make routinely available comprehensive data on investigations and prosecutions of LOAC violations. Although the various services report annual court-martial data to the Congressional Armed Services Committees, these reports do not delineate prosecutions by charge nor do they indicate LOAC violations.³⁴⁷ Moreover, the U.S. practice of charging service members with underlying offenses rather than war crimes greatly frustrates tracking data on LOAC prosecutions.

D11. Have any senior military or security service personnel or senior government officials ever been investigated or prosecuted for possible LOAC violations, or for being responsible for such violations (e.g. by ordering, approving, tolerating, ignoring or covering up violations)?

112. A number of U.S. senior military and government personnel have been investigated or prosecuted for possible LOAC violations. Prosecutions under command responsibility theory, however, have been rare.³⁴⁸ More commonly, senior personnel have been investigated or prosecuted for

³⁴⁶ Secretary of Defense, Memorandum, *Handling of Reports from the International Committee of the Red Cross* (Jul. 14, 2004).

³⁴⁷ UCMJ ANNUAL REPORT TO CONGRESS, *supra* note 292.

³⁴⁸ See *supra* response A.13.

dereliction of duty or other personal failings related to subordinates' offenses. Examples include:

a. In *United States v. Chessani*, the U.S. Marine Corps court-martialed a battalion commander for failure to accurately report and investigate killings committed by persons under his command. The Navy-Marine Court of Criminal Appeal dismissed charges against Chessani due to an appearance of unlawful command influence by a lawyer advising the court-martial convening authority.³⁴⁹

b. In 2004, the Army investigated and initiated prosecution of battalion commander Lieutenant Colonel Nathan Sassaman for allegedly covering up and misleading investigations into his soldiers' drowning of Iraqi detainees.³⁵⁰ Ultimately, Sassaman was disciplined but not tried.³⁵¹

c. In 2004, the U.S. Army commissioned a series of investigations into allegations of detainee abuse at facilities in Iraq. Several investigations focused on the role of senior leaders in encouraging or condoning prohibited interrogation techniques and mistreatment.³⁵² Senior officers from within the U.S. Army conducted each investigation pursuant to internal administrative investigation procedures.³⁵³ Although the Army prosecuted several enlisted members at court-martial, no senior leaders were successfully tried. In the sole trial of a senior leader, a court-martial acquitted Army Lieutenant Colonel Steve Jordan who had been

349 NMCCA 200800299 (Mar. 17, 2009); For discussion of unlawful command influence see *supra* response C.10.

350 See Dexter Filkins, *The Fall of the Warrior King*, NY TIMES MAGAZINE (Oct. 23, 2005), available at: www.nytimes.com/2005/10/23/magazine/23sassaman.html; David Kelly, *Officers Urged Lies in Abuse of Iraqis*, L.A. TIMES (Jul. 31, 2004), at A17.

351 Suzanne Goldenberg, *US to try 20 More Troops for Iraq Abuse*, THE GUARDIAN (Jan. 17, 2005), at 2.

352 See e.g. Dep't of the Army, Lieutenant General Anthony Taguba, *AR 15-6 Investigation of the 800th Military Police Brigade* (Mar. 2004) in THE TORTURE PAPERS: THE ROAD TO ABU GRAIB (Karen J. Greenberg & Joshua L. Dratel, eds., 2005) [hereinafter: THE TORTURE PAPERS]; Dep't of the Army, Lieutenant General Anthony R. Jones & Major General George R. Fay, *AR 15-6 Investigation of the Abu Graib Prison and 205th Military Intelligence Brigade*, (Aug. 2004) in THE TORTURE PAPERS, *supra*.

353 See ARMY PROCEDURES FOR INVESTIGATING OFFICERS, *supra* note 209.

responsible for interrogation operations at Abu Graib, of mistreatment charges in 2007.³⁵⁴ Lieutenant Colonel Jordan received an administrative reprimand.³⁵⁵

D12. What examples are available concerning investigations or other inquiries of alleged LOAC violations regarding the following types of incidents (please indicate their outcome).

- a. Theft/assault or alleged mistreatment of civilians (not taking a direct part in hostilities);

113. On January 15, 2010, Jeremy Morlock and a member of his squad planned to murder of an Afghan civilian, 15 year old Gul Mudin.³⁵⁶ The soldiers were in La Mohammad Kalay, a rural farming community in Afghanistan, when they found an isolated farmer. The two men approached and threw a grenade. They began firing their weapons at the boy and later claimed the boy was an insurgent who attempted to attack them.³⁵⁷ The premeditated killing was one of several with which members of the squad have been charged. The incidents came to light following an investigation into the beating of Adam Winfield, a whistleblower who alerted authorities to the atrocities. In June 2010, Morlock was charged with violation of the UCMJ and in March 2011 he pled guilty to three counts of murder, and one count each of conspiracy, obstructing justice and illegal drug, and was sentenced to twenty-four years in prison.³⁵⁸ Prosecutions of other members of the squad are pending.

354 See *U.S. Officer Cleared of Abu Graib Abuse*, ABC NEWS (Australia) (Jan. 11, 2008), available at: www.abc.net.au/news/stories/2008/01/11/2136868.htm?section=justin.

355 *Id.*

356 DD Form 458, Charge Sheet, Specialist Jeremy Morlock (Jun. 3, 2010), available at: www.haguejusticeportal.net/Docs/NLP/US/morlock.pdf.

357 Mark Boal, *The Kill Team: How U.S. Soldiers in Afghanistan Murdered Innocent Civilians*, ROLLING STONE (Mar. 27, 2011), available at: www.rollingstone.com/politics/news/the-kill-team-20110327?page=1.

358 Associated Press, *Morlock Pleads Guilty to the Deaths of 3 Afghan Civilians*, Available at: www.ktuu.com/news/ktuu-morlock-pleads-guilty-in-deaths-of-3-afghan-civilians-032311,0,1028818.story.

b. Mistreatment of detainees including during interrogation:

114. In 2003, at a military base in Afghanistan, David Passaro was working as a CIA interrogator employed by the CIA. During an interrogation of Abdul Wali, Passaro assaulted the suspected terrorist. Passaro beat Wali with a metal flashlight during two days of interrogation. The suspect ultimately died from the assaults after four days of interrogation.³⁵⁹ Because of Passaro's status as a contractor, as well as lack of MEJA jurisdiction, Passaro was indicted under SMTJ § 7(9). The Government successfully indicated proved Passaro was a U.S. national in violation of a federal criminal law, and the offense occurred on the grounds of a base in a foreign country, used by United States personnel.³⁶⁰ Passaro was charged in June 2004, with assault with a dangerous weapon and assault resulting in bodily injury.³⁶¹ He was sentenced to six years and seven months confinement in April of 2010, following a sentencing error.³⁶² Passaro was never tried for murder, involuntary manslaughter, or torture because of evidentiary difficulties.³⁶³

115. In August 2003, Lieutenant Colonel Allen West, while serving in Taji, Iraq, received information regarding a possible plot to assassinate him. The plot was to be carried out by an Iraqi police officer, Yahya Jhodri Hamoodi.³⁶⁴ After an unsuccessful attempt on West's men, West concluded that the information was legitimate and apprehended Hamoodi.³⁶⁵ During

359 18 U.S.C. § 7; 18 U.S.C. §§ 3261-3267 (2000 & Supp. IV 2004). Indictment at 1, *United States v. Passaro*, No. 5:04-CR-211-1 (E.D.N.C. 2004).

360 *Id.* at 1-3.

361 *Id.* at 1-4.

362 Mandy Locke, *Passaro Sentence is Cut*, NEWS & OBSERVER (Raleigh, N.C.) (Apr. 7, 2010), available at: www.newsobserver.com/2010/04/07/425210/passaros-sentence-is-cut.html#storylink=misearch.

363 Susan Schmidt & Dana Priest, *Civilian Charged in Beating of Afghan Detainee*, WASH. POST (June 18, 2004); Scott Shane, *C.I.A. Contractor Guilty in Beating of Afghan Who Later Died*, N.Y. TIMES (Aug. 18, 2006).

364 Deborah Sontag & Ian Fisher, *The Struggle For Iraq: Interrogations; How Colonel Risked His Career By Menacing Detainee and Lost*, THE NEW YORK TIMES (May 27, 2004), available at: www.nytimes.com/2004/05/27/world/struggle-for-iraq-interrogations-colonel-risked-his-career-menacing-detainee.html?pagewanted=1.

365 *Id.*

apprehension operations and interrogation West's men beat Hamoodi. Threats and violence escalated, culminating when West himself fired a pistol near the head of Hamoodi to scare him into revealing information.³⁶⁶ West had never conducted an interrogation prior to that on Hamoodi, and was charged under the UCMJ.³⁶⁷ The Army lowered West's charges then, in lieu of court-martial, he paid a fine of \$5,000 and resigned his position.³⁶⁸ West is currently a U.S. Congressman from the state of Florida.³⁶⁹

- c. Use of force while helping maintain law and order (either directly or in support of police forces) in occupied territories;

116. In 2004, evidence leaked regarding incidents at the Abu Ghraib prison in Iraq. Pictures of soldiers posing with naked detainees and claims of rape, sexual assault, and physical abuse surfaced through news media. At the center of the scandal were Charles Graner and Lynndie England. Graner was convicted at court-martial and in January 2005, was sentenced to ten years confinement for psychological, physical, and sexual abuse of detainees, as well as conspiracy to maltreat detainees, failing to protect detainees from abuse, cruelty, maltreatment, assault, indecency, and dereliction of duty.³⁷⁰ England received a three year sentence on September 27, 2005 for conspiracy, four counts of maltreating detainees and one count of committing an indecent act.³⁷¹ Between May 2004 and March 2005 eleven soldiers were convicted at courts-martial. Brigadier General Janis Karpinski was cited with dereliction of duty and demoted to Colonel.³⁷²

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ See Congressman Allen West, at <http://west.house.gov>.

³⁷⁰ Associated Press, *Graner Gets 10 Years for Abu Ghraib Abuse* (Jan. 16, 2005), available at: www.msnbc.msn.com/id/6795956.

³⁷¹ Associated Press, *England Gets Sentenced to 3 Years for Prison Abuse* (Sep. 28, 2005), available at: www.msnbc.msn.com/id/9492624/ns/us_news-crime_and_courts/t/england-sentenced-years-prison-abuse.

³⁷² Dave Moniz, *Gen. Karpinski Demoted in Prison Scandal*, USA TODAY (May 5, 2005), available at:

- d. Use of force while seeking to arrest or detain a civilian taking a direct part in hostilities;

117. See response D.12.b. *supra*.

- e. Use of force at a checkpoint or during a similar operation;

118. While at a checkpoint in Iraq, U.S. Army Specialist Steven Green, led several soldiers in a vicious assault on civilians. On March 12, 2006 five U.S. Soldiers, including Green, raped Abeer Qassim Hamza al-Janabi and murdered the entire family.³⁷³ The soldiers attempted to destroy evidence by burning the house down, but the bodies and the crimes were subsequently discovered. Green was tried in the federal court in the U.S. Western District of Kentucky because the Army had discharged prior to indictment on the charges of rape and murder. On May 21, 2009, the civilian jury convicted Green of rape, conspiracy, and multiple counts of murder.³⁷⁴ On September 4, 2009, Green received five consecutive life confinement sentences.³⁷⁵

- f. Targeting civilians taking a direct part in hostilities;

119. In November of 2004, during the second Battle of Fallujah, Jose Luis Nazario Jr. and his squad of 13 marines were clearing houses. Nazario and his unit secured a house with three to five unarmed males inside. Once the house was secured, Nazario is alleged to have ordered the squad to “take care” of the men inside, so that the squad could continue advancing. Several witnesses report that Nazario then executed one of the prisoners inside the house. The remaining men were subsequently executed. Nazario was indicted in June 2007 for the killing of four unnamed civilians in Fallujah,

www.usatoday.com/news/washington/2005-05-05-demotion_x.htm.

373 Unreported (W.D. Ky. 2008) No. 5:06CR-19-R, 2008 W.L. 4000868.

374 *Ex-Soldier Gets 5 Life Sentences For Iraqi Rape*, CBSNews (Sep. 5, 2009), available at: <http://cbs5.com/national/steven.green.iraqi.2.1166196.html>.

375 *Id.*

Iraq.³⁷⁶ At trial, the prosecution presented testimony from former military personnel, as well as polygraph evidence regarding the testimony of these personnel.³⁷⁷ A civilian jury ultimately acquitted Nazario of the charged murders provoking significant debate in the U.S. and abroad regarding the effectiveness of the civilian courts in response to military crimes.³⁷⁸

- g. Use of force against a member of an organized armed group or terrorist organization in the context of an armed conflict;

120. See response D.12.f. *supra*.

- e. Use of force against an enemy which resulted in collateral civilian casualties;

121. On July 12, 2007 an Apache helicopter engaged targets in New Baghdad including 9 military aged men, two of which appeared to carry rocket propelled grenade launchers and several of which were carrying small arms.³⁷⁹ Believing that the military aged men were going to fire on his helicopter, the pilot fired killing eight of the men. Following fire from the helicopter, a van approached the area and attempted to evacuate the men. The helicopter received permission to fire on the van, and disabled the van. After ground forces reached the area, it was established that two of the men were unarmed, and later determined that the two men were, in fact, Reuters news reporters. Footage from the Apache helicopter indicates that these men were mistaken as insurgents in part because their camera

376 Central Dist. of California, Indictment of Nazario (2007), *available at*: www.haguejusticeportal.net/Docs/NLP/US/Nazario_Indictment_4-9-2007.pdf.

377 See generally www.haguejusticeportal.net/eCache/DEF/9/707.html.

378 Catherine Elsworth, *U.S. Marine Acquitted of War Crimes in Ground-Breaking Trial*, THE TELEGRAPH (Aug. 29, 2008), *available at*: www.telegraph.co.uk/news/worldnews/middleeast/iraq/2641186/US-marine-acquitted-of-war-crimes-in-ground-breaking-trial.html.

379 See Dep't of the Army, 2nd Brigade Combat Team, 2nd Infantry Division, Report of Investigation under provisions of Army Regulation 15-6, *Investigation into Civilian Casualties Resulting from an Engagement on July 12, 2007 in the New Baghdad District of Baghdad, Iraq* (Jul. 17, 2007), *available at*: <http://i2.cdn.turner.com/cnn/2010/images/04/06/6--2nd.brigade.combat.team.15-6.investigation.pdf>.

equipment looked like a weapon, and they wore no identifying markings. Additionally, when the van arrived, two civilian children were inside the van. Each suffered wounds from the helicopter fire. The report regarding the incident indicated that there was no knowledge that there were reporters in the region, and additionally the two men had no identifying marks to indicate that they were cameramen.³⁸⁰ No U.S. military criminal proceedings appear to have resulted from the incident.

D13. Is there any other information which you would like to bring to the attention of the Commission?

122. The results of the 2008 U.S. presidential election sparked intense debate over investigation and prosecution of members of the outgoing administration for policies employed in the Global War on Terrorism. A number of supporters of the incoming administration demanded that high-level policymakers and lawyers be held criminally and professionally responsible for U.S. LOAC violations such as the Abu Graib scandal, as well as for interrogation policies and practices at Guantanamo Bay and other detention sites. Supporters of the outgoing administration warned that such efforts would generate a political firestorm and would greatly hamper the service of future executive branch officials. Ultimately, the new President elected not to pursue widespread investigations of officials of the former administration. The decision was couched as part of a larger forward-looking approach to national security operations. It appeared to many that politics had trumped consideration of legal obligations. Outwardly, international legal obligations do not seem to have played a significant role in the decision to forego prosecutions. Definitive legal conclusions should not be drawn from the experience aside, perhaps, from the observation that the President determined he and his Attorney General held a great deal of discretion whether to pursue such cases or not.

³⁸⁰ *Id.* at 14.

APPENDIX: FURTHER DETAILS PROVIDED FOLLOWING INITIAL REVIEW OF REPORT

Question 20 of the “Questions on U.S. Report” asked for an evaluation of a tentative statement regarding the fit between responses to original inquiries C.2., D.2., and D.4. through D.7.

....

123. Differences in the responses at C.2., D.2., and D.4. through D.7. may be attributable to the perceived focus of each inquiry. The responses differentiate the duty to *investigate* and observe applicable procedures from the duty to *report* incidents. The distinction between requirements to report and those concerning initiation and conduct of investigations is important and illustrates that the two systems may not be entirely in synch.

124. For example, the response to C.2. addresses the jurisdictional reach of military investigative procedures. Not surprisingly, civilians are not widely addressed as subjects. However, as the response indicates, the possibility of civilian subjects is anticipated. Still, military investigative regulations and policy provide little specific guidance on treatment of civilians or civilian offenses. Similarly, responses D.4. through D.7. focus on guidance regarding the initiation and conduct of investigations. On the other hand, the response to D.2. focuses on requirements regarding the movement of information, or reporting, concerning suspected or possible LOAC violations within the military.

Question 20 also included a series of sub-parts.

(a) How do these processes fit with operational debriefings, “hot washes” or other inquiries focused on whether the operation was carried out optimally?

125. Operational debriefings, “hot washes,” or after-action reviews (AARs) as they are frequently labeled in DoD parlance, are conducted after nearly every military operation. The AAR process does not constitute part of the military administrative or criminal investigative process. However, statements made or information discovered during AARs may trigger the requirement to report an incident or may form the basis for initiating either criminal or administrative investigations. Information revealed in AARs is not privileged or protected by any form of immunity like that occasionally granted to safety investigations.

(b) In the case of information about a reportable incident, how extensive/ time-consuming is the “preliminary inquiry” required by DoD Law of War Program para 6f(4)(e)(2)? Dick Jackson (The Army Lawyer (June 2010) 95, referred to at fn 301), suggests that this preliminary inquiry might approximate the preliminary inquiry required under the UCMJ. Is there any common understanding – even a very rough one – of how long such an inquiry would take?

126. The nature and duration of a preliminary inquiry are best understood by examining the personnel and assets available to the commander conducting the inquiry. Because preliminary inquiries are conducted at a low level of command with organic assets, they are typically quite simple. Most employ a single, low-ranking officer unassisted by counsel or a reporter. Investigating officers conducting preliminary inquiries typically have no formal investigative training. The scope of inquiry is typically restricted to members of the unit concerned and does not extend beyond the unit’s area of operations.

127. Mr. Jackson’s analogy to the UCMJ preliminary inquiry is apt. Mr. Jackson’s article was written in response to requests for information on the topic and demonstrates the incomplete nature of guidance concerning such investigations. Many regard the scant guidance on preliminary inquiries

as evidence of a desire to preserve flexibility for commanders.

128. The duration and intensity of the inquiry would not be expected to distract too greatly from the investigating officer's primary duties. If a preliminary inquiry officer determined greater expertise, breadth or duration to be appropriate, it is likely the inquiry would be closed with a recommendation for further investigation.

(c) For suspected UCMJ offenses falling short of reportable incidents, if commanders believe the matter is complex or serious enough to require law enforcement assistance, would this necessarily be through the MCIO? Or might it be through, for example, military police attached to the base or installation?

129. A suspected UCMJ offense that did not constitute a "reportable incident" for purposes of the DoD Law of War Program could be deemed appropriate for either an MCIO or military police. For instance, a commander might refer an incident requiring highly technical or forensic analysis to such criminal investigative assets. The level of complexity or technical sophistication would likely determine whether an MCIO or military police were appropriate.

(d) On what basis does the MCIO commander determine whether to proceed with a criminal investigation when a reportable incident is brought to his or her attention?

130. The specific criteria on which MCIO commanders determine whether to proceed are not publicly available. It is possible that no such criteria are enumerated and that such matters are instead left to the judgment and experience of the commander. It is further likely that MCIO commanders themselves delegate authority to determine the appropriate scope and extent of investigations of reportable incidents to their subordinate investigators.

(e) Following an MCIO investigation, who determines what steps are taken next, and particularly whether charges are laid, and if so, what charges? Are there any guidelines on what matters are prosecuted at court martial?

131. Once an MCIO investigation is complete, the commanders of the personnel and units involved determine the criminal or administrative disposition of the incident. As indicated previously, there are few procedures and guidelines specific to LOAC violations and “reportable incidents.” Instead, routine procedures for either adverse administrative action or initiation of NJP or court-martial proceedings apply. For a detailed description of the command-led procedures of court-martial see response D.4. *supra*.

(f) For investigations of any kind that proceed through an MCIO and give rise to court-martial prosecutions, how does the MCIO investigation fit with the “pre-trial investigation” required by the RCM prior to a court-martial?

132. It is important to distinguish “preliminary inquiries” governed by R.C.M. 303 from “pre-trial investigations” required by UCMJ article 32 and discussed at RCM 405 et seq. Preliminary inquiries required by R.C.M. 303 are separate from investigations by MCIOs. As indicated at response C.2., such inquiries may be quite simple and quick, especially in cases where it is obvious that the matter, by virtue of its gravity or complexity, warrants professional criminal investigation.

133. The MCIO investigation is also entirely separate from and cannot substitute for the pre-trial investigation required by article 32 of the UCMJ and outlined in R.C.M. 405 et seq. Article 32 pre-trial investigations resemble court proceedings in many respects and are often thought of as analogous to the U.S. grand jury proceeding. It is not uncommon for evidence discovered in MCIO investigations or statements made to MCIO investigators to be used in article 32 pre-trial investigations.

(g) *Where there are concurrent administrative and criminal investigations (response to question D6 (pp. 51-52)), are there any difficulties regarding custody of evidence or admissibility of testimony given the different protocols applicable to administrative investigations and penalties on one hand, and criminal prosecutions on the other?*

134. Difficulties do arise where concurrent administrative and criminal investigations concern the same incident. A recent update to a Department of Defense Instruction emphasized that investigations by MCIOs or Defense Criminal Investigative Organizations (DCIOs)³⁸¹ have primacy over all other military investigations.³⁸² In my experience as a military criminal lawyer, conflicts concerning access to or custody of physical evidence are resolved in favor of criminal investigations. Perhaps the most common difficulty concerns use during criminal investigations, and ultimately at court-martial, of statements in response to administrative investigations. Under the so-called “fruit of the poison tree” doctrine, evidence traceable to an earlier unwarned statement, even if later interviews on the same subject later warn the suspect of the right against self-incrimination, cannot be introduced at court-martial. Regulations instruct administrative investigators to provide rights warnings in accordance with UMCJ article 31 to persons the investigator suspects have committed criminal offenses.³⁸³

135. Imposing administrative and criminal penalties is less problematic. Although some adverse administrative actions, such as denial of favorable personnel actions to persons pending criminal investigation occur prior to resolution of criminal proceedings, it is more common for imposition of administrative measures to await termination of criminal proceedings.³⁸⁴

381 DCIO is a more inclusive term, referring to the Department of Defense Criminal Investigative Service in addition to the service specific MCIOs such as the Army Criminal Investigative Division and the Naval Criminal Investigative Service.

382 Department of Defense Instruction 5505.03, *Initiation of Investigations by Defense Criminal Investigative Organizations* (Mar. 24, 2011), para. 4.a.

383 ARMY PROCEDURES FOR INVESTIGATING OFFICERS, *supra* note 209, para. 3-7.c.(5)(d).

384 See discussion at response A.5.

The most common example is administrative discharge from the service, which may be imposed following criminal proceedings where no punitive discharge is adjudged.³⁸⁵

(h) Is there any information available on how the DoD policy requiring on-scene commanders to ensure that measures are taken to preserve evidence of reportable incidents (mentioned at pp. 43-44) is operationalized, particularly during the preliminary inquiry periods, or during a command investigation running alongside an MCIO investigation?

136. The DoD Law of War Program requires commanders to preserve evidence of suspected LOAC violations.³⁸⁶ However, no publicly available regulations address in detail specific practices concerning preservation of evidence.

137. Reviews of recent military operations emphasize the need for U.S. forces to improve practices to preserve evidence of crimes on the battlefield. The details of these discussions were viewed in a source restricted to authorized users and cannot be disclosed in this Report. It may be helpful to note, however, that the primary motive for improvement has been to provide better evidentiary support to local national prosecutions of insurgents for unlawful attacks on U.S. forces rather than compliance with perceived international legal obligations.

³⁸⁵ ARMY ENLISTED SEPARATIONS, *supra* note 20, Chapter 10, 14, Section III (Apr. 25, 2010) (authorizing respectively separation in lieu of court-martial and separation for misconduct of enlisted personnel).

³⁸⁶ DoD Law of War Program, *supra* note 11, at para. 4.5.

CANADA: INVESTIGATION AND PROSECUTION OF ALLEGED VIOLATIONS OF THE LAW OF ARMED CONFLICT

Holly MacDougall*

August 2011

GENERAL

- *Provide a general description of the national system for investigating and prosecuting of alleged LOAC violations. In particular, describe whether they are handled by the civilian or military justice systems.*

INVESTIGATION

A. Civilian

1. Canada's national civilian police force, the Royal Canadian Mounted Police (RCMP), is responsible for enforcing all federal statutes, including the *Crimes Against Humanity and War Crimes Act*.¹ The RCMP War Crimes Section in Ottawa assigns full-time police investigators to World War II and Modern War Crimes cases. Support for the Section is provided by RCMP forensic laboratories as well as RCMP personnel stationed throughout Canada and abroad.

2. The RCMP responds to allegations of war crimes and crimes against humanity from victims, witnesses, foreign governments, ethnic communities, NGOs, open source information as well as allegations which

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1 Statutes of Canada (S.C.), 2000, c. 24, s. 8, *available at*: <http://laws-lois.justice.gc.ca/eng/acts/C-45.9/index.html> (hereinafter: *Statutes of Canada*).

may have come to light through refugee, immigration and citizenship applications. For complaints where there is insufficient evidence to proceed with a prosecution, the RCMP provides the information to the Canadian Border Service Agency, to use in seeking exclusion from refugee protection and removal from Canada of suspects.²

B. Military

3. Personnel subject to the *Code of Service Discipline*³ (normally Canadian Forces (CF) members but also includes those persons who accompany the CF, such as Other Government Departments in Afghanistan) come under military police jurisdiction anywhere in the world.⁴ Military police personnel also enforce Canadian law at all Defence establishments, which range from permanent Canadian Forces bases and Defence properties, to any temporary camp, installation or remote site under control of the CF, regardless of the status of the offender.

4. Allegations of LOAC violations may be initially reported to either police force and both may have concurrent jurisdiction to investigate the alleged offence. The circumstances and location of the incident, the interests of military discipline, and whether the military or civilian agencies have better resources to accomplish the task will dictate whether the investigation proceeds in the military or civilian justice system.

2 *Canada's War Crimes Program Seventh Annual Report*, available at: http://cbsa.gc.ca/security-securite/wc-cg/wc-cg2004-eng.html#p192_23024.

3 Part 111 of the *National Defence Act*.

4 *Canadian Forces Provost Marshal Annual Report -2008*, available at: www.vcds.forces.gc.ca/cfpm-gpfc/apm-agp/ar-ra/2008/rep-rap-2008-eng.asp#pco-opc.

PROSECUTION

A. CIVILIAN

5. The Public Prosecution Service of Canada (PPSC) shares concurrent jurisdiction with the Military Justice system for prosecution of most LOAC violations through sections 71, 130 and 273 of the *National Defence Act*⁵ as well as through the *Crimes Against Humanity and War Crimes Act*.⁶ Thus, LOAC violations could be prosecuted either by civilian or military authorities but not both for the same offence. Section 11 (g) of the *Canadian Charter of Rights and Freedoms* constitutionalizes the common law doctrine of double jeopardy by guaranteeing that no one finally acquitted of an offence can be tried for it again and, no one if finally found guilty and punished for an offence, cannot to be tried or punished for it again.

6. There are no existing arrangements or agreements in place between military and civilian authorities to address this issue of concurrent jurisdiction; each case must be individually evaluated. That said, the weight of existing authority suggests that, absent extraordinary circumstances, LOAC violations by members of the Canadian Forces would be prosecuted by military authorities.⁷

Support for this position flows from a number of sources. Arguably, the *Crimes Against Humanity and War Crimes Act*⁸ was not enacted for the purpose of establishing overlapping jurisdiction with respect to Canadian

5 Revised Statutes of Canada (R.S.C.), 1985, c. N-7 (hereinafter: *Revised Statutes of Canada*).

6 *Statutes of Canada*, *supra* note 1.

7 *The Law of Armed Conflict at the Operational and Tactical Level*, B-GG-005-27/AF-021, available at: www.forces.gc.ca/jag/publications/training-formation/LOAC-DDCA_2004-eng.pdf (hereinafter: *The Law of Armed Conflict*); Section 1616 states:

“1. As a general principle, a member of the CF accused of committing a war crime would not normally be prosecuted in a Canadian court for a “war crime.” Such a CF member would more likely be charged with committing an analogous offence under Canadian law (e.g., murder) and would be court martialled under the *Code of Service Discipline*”.

8 *Statutes of Canada*, *supra* note 1.

Forces members who commit crimes outside Canada. Instead, it appears that it was put in place to address the problem of war criminals immigrating to Canada.⁹ There is also some support for the notion that it is generally not appropriate to try members of one's own forces for war crimes, there being a code of service discipline for that, as well as broader purposes, in the jurisprudence of other states.¹⁰

B. Military

7. In the Canadian military context, only two precedents are relevant to this issue. The 1994 Somalia courts martial are of little assistance as these charges could not have proceeded as war crimes since there was no armed conflict in Somalia at the time.¹¹ The recent court martial of Captain Samrau is more instructive in this regard. Although Captain Samrau was not charged with LOAC violations, it is clear that the alleged infractions could have constituted war crimes.¹² The fact that military authorities

9 See, for example, *Canada's War Crimes Program - Tenth Annual Report 2006-2007*, available at: www.cbsa-asfc.gc.ca/security-securite/wc-cg/wc-cg2007-eng.html (hereinafter: *Canada's War Crimes Report 2006-2007*).

10 See *U.S. v. Calley* (1969) 46 CMR 1131: "Normally, if the offender is a member of the trying authority's forces, he or she will be tried in accordance with his or her own military law and not under international law, even though the crimes committed may be described as war crimes".

11 For a general discussion of the results of the Somalia courts martial see, *Report of the Somalia Commission of Inquiry, The Somalia Mission: Post-Deployment; The Courts Martial*, available at: www.forces.gc.ca/site/reports-rapports/som/vol1/index-eng.asp.

12 Captain Samrau was charged with four offences; second degree murder, attempted murder with a fire arm which was an alternate charge to the second degree murder charge, negligently performing a military duty and behaving in a disgraceful manner by shooting an unarmed prisoner. He was acquitted on the first 3 charges and convicted of the fourth one. The circumstances surrounding the commission of the offence are recorded at paras. 5-6 of the sentencing decision, available at: www.jmc-cmj.forces.gc.ca/dec/2010/doc/2010cm4010-eng.pdf.

"You deployed to Afghanistan in 2008 as part of the Operational Mentor Liaison Team assigned to mentor the Afghan National Army (ANA). You were the commander of call sign 72A. This team was composed of four members divided into two fire teams. During the month of October 2008, you were involved in a clearing operation with the Afghan National Army in Helmand province in Afghanistan. You were mentoring the commander of an Afghan infantry company during this operation. On 19 October 2008, the lead element of that company encountered an enemy position. Attack helicopters were called in to suppress the enemy position. You and your fire team partner were located with Captain Ahaffigullah, the ANA company commander, at the rear of the company when you first came upon the first insurgent who was lying on a path by a cornfield. The situation on the ground at the time seemed relatively calm although the potential danger is omnipresent in such combat operations. After a brief examination of the insurgent, the ANA company commander moved to the position of the dead insurgent in the next cornfield. You also went to the location of the second insurgent and then returned to the location of the first insurgent so that your fire team partner could photograph the

handled the prosecution of the only recent case where a CF member has been charged with offences that could constitute a war crime lends significant support to the position that LOAC violations by CF members will normally be prosecuted by military authorities as breaches of the *Code of Service Discipline*.

- *What acts are considered breaches of the LOAC?*

8. All violations of international law in relation to an armed conflict are considered breaches of LOAC.

- *What breaches of LOAC are considered to be war crimes? Is the source of the designation as a “war crime” found in legislation or case law? Please elaborate.*

9. The term “war crime” may be considered in a broad sense as well as in narrow, technical sense. Broadly speaking “war crimes” include serious violations of International Law in relation to an armed conflict for which individuals may be prosecuted and punished including crimes against peace, crimes against humanity and genocide. In the narrow, technical sense “war crimes” are serious violations of the laws and customs of war.¹³

10. War crimes are defined in the *Crimes Against Humanity and War Crimes Act* as “an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission”.¹⁴ Because of the *Crimes Against Humanity and War Crimes Act* interpretative

insurgent for intelligence purposes. Once the photographs had been taken, you shot the insurgent”.

13 *The Law of Armed Conflict*, *supra* note 7, at s. 1602(1)

14 *Statutes of Canada*, *supra* note 1, at ss. 4(3) and 6(3).

provisions,¹⁵ the crimes described in articles 6, 7 and 8(2) of the *Rome Statute* are “crimes according to customary international law”.

- *What acts fall within any such legislation or case law?*

11. There are three classes of offences prosecutable under the *Crimes Against Humanity and War Crimes Act*; genocide, crimes against humanity and war crimes,¹⁶ all of which are subject to a punishment of imprisonment for life upon conviction.

In addition, the *Geneva Convention Act*¹⁷ creates a potentially broader category of offences encompassing all grave breaches of the Geneva Conventions for the Protection of War Victims and Additional Protocol 1.¹⁸

- *How are breaches of LOAC dealt with if they do not amount to war crimes?*

12. As a caveat to the following response, one must remember that as a general principle, a member of the CF accused of committing a war crime would not normally be prosecuted in a Canadian court for a “war crime.” Such a CF member would more likely be charged with committing an analogous offence under Canadian law (e.g., murder) and would be court martialed under the *National Defence Act*.¹⁹ That said, for those circumstances where the breaches alleged do not amount to a war crime but still constitute a breach of LOAC, other avenues of prosecution may be available.

15 *Id.*, at ss. 4(4) and 6(4).

16 *Id.*, at ss. 4(3) and 6(3).

17 R.S.C., 1985, c. G-3.

18 See LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 296 (Manchester University Press, 2nd ed., 2000). Green argues that “war crimes and crimes against humanity are synonymous with those named as grave breaches in the Geneva Conventions and Protocol 1”.

19 *Revised Statutes of Canada*, *supra* note 5.

13. A 2008 summary trial in Afghanistan is an excellent example of another avenue of prosecution that is available in this type of scenario.²⁰ Section 129 of the *National Defence Act*²¹ creates the offence of “Conduct to the Prejudice of Good Order and Discipline”. Further, subsections (2) (b) and (c) deem as prejudicial to good order and discipline any contravention of “any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or any general, garrison, unit, station, standing, local or other orders”. One example of such an order or instruction is the “Code of Conduct for CF Personnel”.²² Rule 8 of this Code of Conduct states that “Looting is prohibited.”²³

14. On 23 December 2008, a CF officer was tried for a breach of Rule 8 of the Code of Conduct for CF Personnel under section 129 of the *National Defence Act*. The charge was stayed and the officer was convicted of the alternate charge of failing to comply with Theatre Standing Orders (artefacts/trophies of war) by taking the headdress of a deceased person.

- *Is your country Party to the International Criminal Court statute? If so, how does that influence the national system of investigation and prosecution regarding alleged LOAC violations?*

15. Canada is a party to the 1998 *Rome Statute of the International Criminal Court*. It was signed by Canada on December 18, 1998 and ratified July 7, 2000. The 2000 *Crimes Against Humanity and War Crimes Act* was Canada’s implementing instrument for the *Rome Statute*.

16. Prior to the *Rome Statute*, Canada already had an established crimes

²⁰ See information on Capt Gapp’s summary trial at Annex A attached to this report.

²¹ *Revised Statutes of Canada*, *supra* note 5.

²² *Code of Conduct for CF Personnel*, B-GG-005-027/AF-023, available at: www.forces.gc.ca/jag/publications/training-formation/CFCC-CCFC-eng.pdf (hereinafter: *CF Code of Conduct*).

²³ *Id.*, at 2-13.

against humanity and war crimes program.²⁴ However, the passage of the *Crimes Against Humanity and War Crimes Act* combined with Canada's support to international efforts to bring war criminals to justice raised public expectations that Canada would proceed with domestic prosecutions. In order to effectively investigate and prepare modern cases for prosecution, there was an urgent need for the development of a process model between the RCMP (who are responsible for criminal investigations under the *Act*) and the Department of Justice (DOJ). International practice suggested a more integrated system with researchers, counsel, and police investigators working in small teams on priority cases.²⁵ As a result, in November 2004, the RCMP and DOJ signed a Guiding Principles agreement in order to enhance the ability to conduct criminal investigations.²⁶ Currently, the RCMP War Crimes Section, and the DOJ Crimes Against Humanity and War Crimes Section work together to assess allegations referred for criminal investigation under the *Crimes Against Humanity and War Crimes Act*. Once an investigation is complete, the DOJ and RCMP review the results of these investigations to decide whether to refer the matter to the Public Prosecution Service of Canada.²⁷

- *Does your country treat human rights law as applicable in armed conflict? If so, on what basis and to what extent?*

17. As a starting position, Canada treats International Human Rights Law (IHRL) as applying at all times, both in peacetime and in situations of armed conflict.²⁸ It does not mean, however, that every situation that arises

24 1998 Public Report: Canada's War Crime Program, available at: www.justice.gc.ca/warcrimes-crimesdeguerre/researchreports-rechercherapports-eng.asp.

25 Fifth Annual Report; Canada's Crimes Against Humanity and War Crimes Program 2001-2002, available at: www.justice.gc.ca/warcrimes-crimesdeguerre/researchreports-rechercherapports-eng.asp.

26 Canada's War Crimes Program - Eighth Annual Report 2004-2005, available at: www.justice.gc.ca/warcrimes-crimesdeguerre/researchreports-rechercherapports-eng.asp.

27 Canada's War Crimes Report 2006-2007, *supra* note 9.

28 It is well recognized that the international human rights laws apply at all times, whether in times of peace or situations of armed conflict. The international Court of Justice (ICJ) affirmed this principle in the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*. This position is reflected in

in armed conflict is covered by IHRL. The question of how IHRL relates to the *lex specialis* of LOAC is still the subject of significant discussion, in Canada and abroad. The Canadian Forces position is that “in a situation of armed conflict, IHRL obligations are not displaced but the relevant human rights principles can only be decided by reference to the law applicable in armed conflict, the specialized law of LOAC. In the event of an apparent inconsistency regarding the content of the two strands of law, the more specific provisions will prevail.”²⁹

18. The recent decision by the Federal Court of Canada in *Amnesty International Canada v. Canada (Chief of the Defence Staff)* confirms this latter statement by accepting that the applicable legal regime for the transfer of detainees by Canadian Forces members to Afghan authorities is LOAC.³⁰

19. Complex operational and security environments often include complex legal issues. Both legal regimes (LOAC and IHRL) co-exist during an armed conflict, and the extent to which either is applicable in a particular circumstance will be fact dependent.

- *Is your country subject to national/regional human rights tribunals or other fora which could investigate alleged LOAC violations (e.g., European Court of Human Rights)? If so, please briefly describe any key cases in that regard.*

the Canadian Forces Joint Publication CFPJ – 5.1, *Use of Force for CF Operations*, available at: www.cfd-cdf.forces.gc.ca/cfwc-cgfc/Index/JD/Pub_Eng/J5%20Publications/CF%20Joint%20Doctrine%20B-GJ-005-501%20FP-001%20Use%20of%20Force%20-%20EN.pdf (hereinafter: *Use of Force for CF Operations*) which states at para. 104(12) “It is also well recognized that the international human rights laws apply at all times, whether in times of peace or situations of armed conflict”.

29 *Id.*, at para. 104(13).

30 *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, [2008] 4 F.C.R. 546, para. 327, available at: www.canlii.org/en/ca/fct/doc/2008/2008fc336/2008fc336.html;

Appeal dismissed and this position confirmed. [2009] 4 F.C.R. 149, para. 36, available at: www.canlii.org/en/ca/fca/doc/2008/2008fca401/2008fca401.html.

20. There are no national /regional human rights tribunals or other similar fora in Canada which can investigate LOAC violations.

- *What other possibilities are there for investigating possible LOAC violations (e.g. public inquiries, parliamentary hearings, special prosecutors)?*

21. In addition to criminal/disciplinary investigations, the following options are potentially available for investigating LOAC violations:³¹

PARLIAMENTARY COMMITTEES

22. As with other large deliberative assemblies, the Canadian House of Commons (House) has taken advantage of the greater flexibility available in committees to carry out functions that can be better performed in smaller groups, including the examination of witnesses and consideration of issues of public importance.

Committees are extensions of the House, created by either standing or special orders, and are limited in their powers by the authority delegated to them.³²

The most likely forum to be used in investigating LOAC violations are

31 The Military Police Complaints Commission (established under Part IV of the *National Defence Act*, s.250 -250.53) is not included in this discussion because of the Federal Court ruling that they did not have jurisdiction to investigate allegations that the Canadian Forces Provost Marshal and unnamed members of the CF military police, on at least 18 occasions transferred detainees to Afghan authorities notwithstanding alleged evidence that there was likelihood they would be tortured. Rather, their investigation was limited to allegations that the military police wrongly failed to investigate Canadian Forces commanders for allegedly ordering the transfer of Afghan detainees to a known risk of torture at the hands of Afghan security forces, most notably the Afghan National Directorate of Security. See *Attorney General of Canada v. Amnesty International Canada and British Columbia Civil Liberties Association*, 2009 F.C. 918, available at: <http://decisions.fct-cf.gc.ca/en/2009/2009fc918/2009fc918.html>.

32 *Compendium: House of Commons - Committees*, available at: www.parl.gc.ca/About/House/compendium/web-content/c_g_committees-e.htm.

special committees which are appointed by the House to carry out specific inquiries, studies or other tasks that the House judges to be of special importance.³³ Each special committee is created by means of an order of reference adopted by the House (in the case of special joint committees, by both the House of Commons and the Senate). This motion defines the committee's mandate and usually enumerates its powers, membership and the deadline for submitting its final report. A special committee ceases to exist once its final report has been presented to the House, or at prorogation.³⁴

PUBLIC INQUIRIES

23. A public inquiry is an official review, ordered by government, of important public events or issues. Its purpose is to establish the facts and causes of an event or issue, and then to make recommendations to the government.³⁵

The primary federal legislation concerning public inquiries is the *Inquiries Act*.³⁶ This *Act* sets out the manner in which public inquiries may be called, as well as some of their powers and responsibilities.

24. A public inquiry could be ordered by the federal government to investigate a specific LOAC violation allegation that has raised public alarm. *The Commission of Inquiry into the Deployment of the CF in Somalia* (1994-97) is the best example of such an inquiry of this type,

33 The Special Committee on the Canadian Mission in Afghanistan was first created in April 2008 by motion adopted by House of Commons on 13 March 2008. As part of its mandate *available at*: www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=40&Ses=3&DocId=4324624. It has been conducting hearings into the transfer of detainees by Canada to Afghan officials almost since its inception. No report on this issue has yet been tabled by the Special Committee.

34 *Special and Special Joint Committees*, *available at*: www.parl.gc.ca/About/House/compendium/web-content/c_d_specialspecialjointcommittees-e.htm.

35 *Available at*: www.mapleleafweb.com/features/public-inquiries-canada#introduction.

36 R.S.C., 1985, c. I-11.

although technically it did not investigate an LOAC violation, as Canada was not involved in an armed conflict with Somalia.³⁷ This commission investigated the events surrounding the alleged torture and murder of a young Somali prisoner by Canadian peacekeepers in Somalia. The Canadian Airborne Regiment, which was stationed in Somalia, was disbanded during the course of this public inquiry.

BOARDS OF INQUIRY (BOI)

25. Subsection 45(1) of the *National Defence Act (NDA)*³⁸ provides the legal authority for the conduct of a BOI:

The Minister, and such other authorities as the Minister may prescribe or appoint for that purpose, may, where it is expedient that the Minister or any such other authority should be informed on any matter connected with the government, discipline, administration or functions of the Canadian Forces or affecting any officer or non-commissioned member, convene a board of inquiry for the purpose of investigating and reporting on that matter.

Pursuant to this ministerial authority, *Queens Regulations & Orders*³⁹ 21.06(2) empowers the Minister of National Defence, the Chief of Defence Staff, an officer commanding a command, an officer commanding a formation and a commanding officer (CO) to convene a BOI.

26. The decision to convene a BOI must be premised on the ‘primary purpose test’ that is articulated in DAOD 7002-1 (Boards of Inquiry).⁴⁰ A BOI must not be convened “if the sole or primary purpose is to obtain

37 Available at: www.dnd.ca/somalia/somaliae.htm.

38 *Revised Statutes of Canada*, *supra* note 5.

39 Available at: www.admfincs.forces.gc.ca/qro-orf/vol-01/tc-tm-021-eng.asp (hereinafter: *Queens Regulations & Orders*).

40 Available at: www.admfincs.forces.gc.ca/dao-doa/7000/7002-1-eng.asp.

evidence for a disciplinary purpose or to assign criminal responsibility.” Notwithstanding that the *NDA* provides that a BOI may be used to investigate and report on “...any matter connected with the government, discipline, administration or functions of the CF...,” convening a BOI for a criminal or disciplinary purpose remains problematic because compelled evidence would not be admissible in a disciplinary proceeding.⁴¹

27. Several BOIs have been ordered to investigate the treatment and transfer of detainees by Canadian Forces personnel in Afghanistan.⁴²

- *What is the basis for criminal jurisdiction over breaches of LOAC in your country (territoriality, nationality, passive personality, protective)?*

28. As a general rule, Canadian criminal legislation is territorial, unless specifically declared to be otherwise in legislation. The *Crimes Against Humanity and War Crimes Act*⁴³ specifically extends Canadian jurisdiction over breaches of LOAC beyond the concept of territoriality as follows:

Offences outside Canada:

8. A person who is alleged to have committed an offence under section 6 or 7 may be prosecuted for that offence if
- (a) at the time the offence is alleged to have been committed,
 - (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,
 - (ii) the person was a citizen of a state that was engaged in an

41 A-LG-007-000/AF-010 *Military Administrative Law Manual*, available at: www.forces.gc.ca/jag/publications/adminlaw-loiadmin/MilAdminlaw-DroitAdminMill-eng.pdf, at c. 4 (hereinafter: *Military Administrative Law Manual*).

42 Available at: www.vcds.forces.gc.ca/boi-cde/archive-eng.asp.

43 *Statutes of Canada*, *supra* note 1.

armed conflict against Canada, or was employed in a civilian or military capacity by such a state,

(iii) the victim of the alleged offence was a Canadian citizen, or

(iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or

(b) after the time the offence is alleged to have been committed, the person is present in Canada.

9. (1) Proceedings for an offence under this Act alleged to have been committed outside Canada for which a person may be prosecuted under this Act may, whether or not the person is in Canada, be commenced in any territorial division in Canada and the person may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

- *Does the national war crimes legislation jurisdiction extend to members of the military? If so, under what circumstances?*

29. The *Crimes Against Humanity and War Crimes Act* extends to military members, for both the commission of the substantive offence as well as for command responsibility.⁴⁴ That does not mean, however, that civilian authorities will exercise this jurisdiction. Please refer to [1]-[4] above for further details.

- *Is there universal jurisdiction and how is such jurisdiction exercised?*

30. The issue of universal jurisdiction in Canada was recently addressed

⁴⁴ *Id.*, at ss. 5(1) and 7(1).

by the Supreme Court of Canada in *R. v. Hape*,⁴⁵ wherein the Court recognized that “the principle that a state’s law applies only within its boundaries is not absolute: *The Case of the S.S. “Lotus”* (1927), P.C.I.J. Ser. A, No. 10, at p. 20. States may invoke a jurisdiction to prescribe offences committed elsewhere to deal with special problems...”⁴⁶

The Court indicated that universal jurisdiction in Canada was exercised as follows:

The *Statute of Westminster, 1931* (U.K.), 22 Geo. 5, c. 4, s. 3, conferred on Canada the authority to make laws having extraterritorial operation and Canada has enacted legislation with extraterritorial effects on several occasions. Some examples can be found in criminal legislation, including the *Crimes Against Humanity and War Crimes Act*, which addresses crimes of universal jurisdiction. Section 6(1) of that statute provides that every person who commits genocide, a crime against humanity or a war crime outside Canada is guilty of an indictable offence. Pursuant to s. 8, such a person may be prosecuted in Canada: (a) if at the time of the offence the person was a Canadian citizen or a citizen of a state engaged in armed conflict against Canada, or the victim was a Canadian citizen or a citizen of a state allied with Canada in an armed conflict; or (b) if, after the time of the offence was committed, the person is present in Canada. These provisions exemplify valid extraterritorial prescriptive jurisdiction, and any trial for such offences would constitute a legitimate exercise of extraterritorial adjudicative jurisdiction. But, importantly, they do not authorize Canada to enforce the prohibitions in a foreign state’s territory by arresting the offenders there. Section 7 of the *Criminal Code*, contains a number of provisions that deem certain acts - including attacks on internationally protected persons or U.N. personnel, torture or hostage taking - to have been committed in Canada even though they took place in other

45 [2007] 2 S.C.R. 292, available at: www.canlii.org/en/ca/scc/doc/2007/2007scc26/2007scc26.html.

46 *Id.*, at para. 66.

countries. Although committed outside Canada, such an act will be deemed to have been committed in Canada if, *inter alia*, the person who committed it is a Canadian citizen or normally resides in Canada, it was committed on an aircraft registered in Canada or it was committed against a Canadian citizen.

On the other hand, it is recognized that there are limits to the extraterritorial application of Canadian law. Section 6(2) of the *Criminal Code* provides: "Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada." As a general rule, then, Canadian criminal legislation is territorial unless specifically declared to be otherwise.⁴⁷

- *Does your country deal with the issue of "command responsibility"? If so, how?*

31. The fact that a subordinate committed a breach of the LOAC does not absolve superiors from penal or disciplinary responsibility. Superiors are guilty of an offence if they knew, or had information which should have enabled them to conclude, in the circumstances ruling at the time, that the subordinate was committing or about to commit a breach of the LOAC, and they did not take all feasible measures within their power to prevent or repress the breach.⁴⁸

- *Does your country deal with the "defence of superior orders"? If so, how?*

32. It is no defence to a war crime in Canada that the act was committed in compliance with an order.⁴⁹ An act that is performed in compliance with an order which is manifestly unlawful to a reasonable soldier given the circumstances prevailing at the time does not constitute a defence

47 *Id.*, at para. 66-67.

48 *Statutes of Canada*, *supra* note 1, at s. 5(1) and 7(1).

49 *Id.*, at s.14.

and cannot be pleaded in mitigation of punishment. In *R. v Finta*⁵⁰ the Supreme Court of Canada considered the question of when an order should be considered manifestly unlawful. Mr. Justice Cory stated, “It must be one that offends the conscience of every reasonable, right thinking person: it must be an order which is obviously and flagrantly wrong”.

CIVILIAN JUSTICE SYSTEM

- *What is the structure of the civilian system of justice and the role of civilian courts, attorney general or an equivalent prosecution authority and the civilian police in general, and specifically regarding the investigation and prosecution of alleged LOAC violations?*

GENERAL

A. Overview

33. The enactment of criminal law is within the exclusive jurisdiction of the federal government. The *Criminal Code of Canada*⁵¹ is applicable uniformly throughout the entire country. Provinces cannot enact criminal legislation and any attempt to do so will be deemed *ultra vires* pursuant to sections 91 and 92 of the *Constitution Act, 1982*. The provinces are responsible for the administration of courts, including criminal courts, within their respective provinces, despite their inability to enact criminal laws. Provinces do have the power to promulgate quasi-criminal or regulatory offences in a variety of administrative and other areas, and every province has done so with a myriad of rules and regulations across a broad spectrum.

50 [1994] 1 S.C.R. 701, available at: www.canlii.org/en/ca/scc/doc/1994/1994canlii129/1994canlii129.html.

51 R.S.C., 1985, c. C-46, available at: <http://laws-lois.justice.gc.ca/eng/acts/C-46/index.html> (hereinafter: *R.S.C., 1985*).

B. The Courts

34. The organization of Canada's judicial system is a function of Canada's Constitution, and particularly of the *Constitution Act, 1867*. By virtue of that *Act*, authority for the judicial system in Canada is divided between the federal government and the ten provincial governments. The latter are given jurisdiction over "the administration of justice" in the provinces, which includes "the constitution, organization and maintenance" of the courts, both civil and criminal, in the province, as well as civil procedure in those courts.

35. The federal government is given the authority to establish "a General Court of Appeal for Canada and any Additional Courts for the better Administration of the Laws of Canada". It has used this authority to create the Supreme Court of Canada as well as the Federal Court of Appeal, the Federal Court and the Tax Court of Canada. The federal government also has, as part of its jurisdiction over criminal law, exclusive authority over the procedure in courts of criminal jurisdiction.

36. The courts in Canada are organized in a four-tiered structure. The Supreme Court of Canada sits at the apex of the structure and, consistent with its role as "a General Court of Appeal for Canada", hears appeals from both the federal court system, headed by the Federal Court of Appeal and the provincial court systems, headed in each province by that province's Court of Appeal. In contrast to its counterpart in the United States, the Supreme Court of Canada functions as a *national*, and not merely *federal*, court of last resort.

The next tier down from the Supreme Court of Canada consists of the Federal Court of Appeal and the various provincial courts of appeal. The next tier down consists of the Federal Court, the Tax Court of Canada and the provincial and territorial superior courts of general jurisdiction. These

latter courts can fairly be described as the lynchpin of the Canadian judicial system since, reflecting the role of their English counterparts, on which they were modeled; they are the only courts in the system with inherent jurisdiction in addition to jurisdiction granted by federal and provincial statutes.

At the bottom of the hierarchy are the courts typically described as provincial courts. These courts are generally divided within each province into various divisions defined by the subject matter of their respective jurisdictions; hence, one usually finds a Traffic Division, a Small Claims Division, a Family Division, a Criminal Division, and so on. Although at the bottom of the hierarchy, these courts handle the overwhelming majority of cases that come into the Canadian Court system.

37. The independence of the judiciary in Canada is guaranteed both explicitly and implicitly by different parts of the Constitution of Canada. This independence is understood to consist in security of tenure, security of financial remuneration and institutional administrative independence.⁵²

C. The Police

38. In Canada, there are three levels of police forces: municipal, provincial, and federal. Constitutionally, law enforcement is a provincial responsibility, and most urban areas have been given the authority by the provinces to maintain their own police force. All but three provinces in turn contract out their provincial law enforcement responsibilities to the Royal Canadian Mounted Police, the national police force.⁵³

⁵² Available at: www.scc-csc.gc.ca/court-cour/sys/index-eng.asp.

⁵³ Sections 18 and 20 of the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10, available at: <http://laws-lois.justice.gc.ca/eng/acts/R-10/page-6.html#h-16>, reads:

18. It is the duty of members who are peace officers, subject to the orders of the Commissioner, (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others

39. As peace officers, police force members are bound by internal directives and by obligations imposed on peace officers in relation to the preservation of the peace, the prevention of crime and offences against the laws of Canada and the laws in force in any province or territory in which they may be employed. The manner in which these duties are carried out are governed by law and by the rules prescribed in applicable police operations manuals.

D. The Prosecution

40. The federal and provincial governments share jurisdiction over criminal prosecutions. Generally, the authority to prosecute offences under the *Criminal Code* (*Code*) is given to provincial attorneys general. The Attorney General of Canada has authority to prosecute in the following situations:

- a. under all federal statutes, where the prosecution takes place in the Yukon Territory, the Northwest Territories or Nunavut;
- b. where a prosecution is conducted pursuant to the *Controlled Drugs and Substances Act*;

who may be lawfully taken into custody;

(b) to execute all warrants, and perform all duties and services in relation thereto, that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully executed and performed by peace officers;

(c) to perform all duties that may be lawfully performed by peace officers in relation to the escort and conveyance of convicts and other persons in custody to or from any courts, places of punishment or confinement, asylums or other places; and

(d) to perform such other duties and functions as are prescribed by the Governor in Council or the Commissioner.

20. (1) The Minister may, with the approval of the Governor in Council, enter into an arrangement with the government of any province for the use or employment of the Force, or any portion thereof, in aiding the administration of justice in the province and in carrying into effect the laws in force therein.

(2) The Minister may, with the approval of the Governor in Council and the lieutenant governor in council of any province, enter into an arrangement with any municipality in the province for the use or employment of the Force, or any portion thereof, in aiding the administration of justice in the municipality and in carrying into effect the laws in force therein.

- c. where federal officials lay an information for a non-*Criminal Code* offence and a federal prosecutor conducts the proceedings;
- d. where persons other than federal officials lay an information which is then by arrangement or practice referred to a federal prosecutor to conduct the proceeding;
- e. where a provincial Attorney General has conferred authority to prosecute a specific charge; and
- f. where the *Criminal Code* provides specific authority to the Attorney General of Canada to conduct a prosecution.

Decisions to prosecute stay proceedings or launch an appeal must be made in accordance with legal criteria. Two important principles flow from this proposition. First, prosecution decisions may take into account the public interest but must not include any consideration of the political implications of the decision. Second, no investigative agency, department of government or Minister of the Crown may instruct pursuing or discontinuing a particular prosecution or undertaking a specific appeal. These decisions rest solely with the Attorney General (and his or her counsel). The Attorney General must for these purposes be regarded as an independent officer, exercising responsibilities in a manner similar to that of a judge.⁵⁴

54 *The Federal Prosecution Service Deskbook*, c. 4, available at: www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/ch04.html (hereinafter: *Federal Prosecution Service Deskbook*).

The absolute independence of the Attorney General in deciding whether to prosecute and in making prosecution policy is an important constitutional principle in England and Canada. As the Supreme Court stated in *Law Society of Alberta v. Krieger*, [2002] 3 S.C.R. 372, para. 30, available at: www.canlii.org/en/ca/scc/doc/2002/2002scc65/2002scc65.html (hereinafter: *Law Society of Alberta v. Krieger*): “It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions”. In 1925, Viscount Simon, Attorney General of England, made this oft-quoted statement:

“I understand the duty of the Attorney-General to be this. He should absolutely decline to receive orders from the Prime Minister, or Cabinet or anybody else that he shall prosecute. His first duty is to see that no one is prosecuted with all the majesty of the law unless the Attorney-General, as head of the Bar, is satisfied that the case for prosecution lies against him. He should receive orders from nobody”.

LOAC VIOLATIONS

A. The Courts

41. In the civilian criminal justice stream, offences under the *Crimes Against Humanity and War Crimes Act* may only be tried by a provincial Superior Court of Criminal Jurisdiction.⁵⁵

B. The Police

42. The response to this question has already been provided. Please refer to [1]-[4] above for further details.

C. The Prosecution

43. The Public Prosecution Service of Canada (PPSC) prosecutes war crimes in Canada based on major investigations conducted by the RCMP War Crimes Section under the *Crimes Against Humanity and War Crimes Act*.

- *If there is an attorney general or similar individual in your country, what is his or her role, in particular with regard to incidents that involve possible LOAC issues or possible LOAC violations? Does he/she provide advice on legal matters, supervise subordinate prosecutors, oversee investigative or police personnel? Who has the authority to determine whether or not to prosecute? Is there any other relevant authority?*

⁵⁵ R.S.C., 1985, *supra* note 51, at ss. 468 and 469.

GENERAL

44. Section 5 of the *Department of Justice Act*⁵⁶ sets out the duties and responsibilities of the Attorney General of Canada. The powers and duties that belong to the office of the Attorney General of England are entrusted to the Attorney General of Canada, in so far as those powers and duties are applicable to Canada. The powers and duties that belonged to the office of the Attorney General of each province up to the time when the *Constitution Act, 1867* came into effect are also entrusted to the Attorney General of Canada, in so far as those laws are to be administered and carried into effect by the Government of Canada.

45. The Attorney General of Canada provides legal advice to the heads of the Government departments. Further, the Attorney General carries out all litigation for or against the Crown or any department of the Government of Canada.

Many federal statutes give the Attorney General additional powers and duties relating to prosecutions. These are conferred both directly on the Attorney General personally, and indirectly on the Attorney General through the many responsibilities placed on “the prosecutor” in the *Criminal Code*.⁵⁷

The decision to institute, continue or terminate criminal proceedings is an important exercise of the Attorney General’s discretion.⁵⁸ Not every alleged breach of the criminal law will result in a criminal prosecution. In determining which cases to prosecute, the Attorney General (usually through Crown counsel) exercises a broad discretion in the public interest.⁵⁹

56 R.S.C., 1985, c. R-10, available at: <http://laws-lois.justice.gc.ca/eng/acts/J-2/page-3.html>.

57 R.S.C., 1985, *supra* note 51, at s.2.

58 For a short history of the authority from which this discretion is derived see *Law Society of Alberta v. Krieger*, *supra* note 54, at para. 24-29.

59 *Federal Prosecution Service Deskbook*, *supra* note 54, at c. 3.

46. The *Director of Public Prosecutions Act*⁶⁰ makes the Director (DPP) responsible for conducting and initiating prosecutions within the jurisdiction of the Attorney General of Canada. The Attorney General of Canada can issue a directive to the DPP in respect of a prosecution or assume conduct of a prosecution, but must do so in writing and a notice must be published in the *Canada Gazette*. As part of the DPP's accountability to the Attorney General, and to assist the Attorney General in deciding whether to give direction or assume conduct, the DPP must inform the Attorney General of any prosecution that may raise important questions of general interest.⁶¹

47. Most of the responsibilities of the DPP are carried out by federal prosecutors employed by the Public Prosecution Service of Canada or private-sector agents employed by the DPP. All federal prosecutors work pursuant to delegations issued by the DPP under the *Director of Public Prosecutions Act*.⁶²

LOAC VIOLATIONS

48. The *Crimes Against Humanity and War Crimes Act* requires the *personal consent* in writing of the Attorney General or Deputy Attorney General of Canada for proceedings under the *Act to proceed*.⁶³ Under s.3 (4) of the *Director of Public Prosecutions Act* the DPP is the Deputy Attorney General of Canada for purposes of performing this function. In practice, it is the DPP who gives consent to proceedings under s. 9(3) of the *Crimes against Humanity and War Crimes Act*.⁶⁴

60 S.C. 2006, c. 9, s. 121, available at: <http://laws-lois.justice.gc.ca/eng/acts/D-2.5/page-1.html#h-3>.

61 *Id.*, at s. 13.

62 *PPSC Annual Report 2009-2010*, available at: www.ppsc-sppc.gc.ca/eng/pub/ar10-ra10/ar10-ra10.pdf (hereinafter: *PPSC Report 2009-2010*).

63 *Statutes of Canada*, *supra* note 1, at s. 9 (3).

64 Email from DPP to author of this report, dated 10 June 2011 confirming this practice.

- *Do the civilian investigative authorities, including criminal investigators, act independently or are they subject to the direction of the prosecutor or other actors in the justice system?*

POLITICAL DIRECTION

49. Maintaining the independence of the police from direct political control is fundamental to the Canadian system of law enforcement. The police cannot be directed by the Executive or by Parliament to start an investigation, much less lay charges.⁶⁵ In *R. v. Metropolitan Police Commissioner, ex parte Blackburn*, Lord Denning described the principle in this way:

I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.⁶⁶

⁶⁵ Section 5 of the *Royal Canadian Mounted Police Act* provides that the Commissioner of the RCMP has the control and management of the Force, subject to the “direction” of the Solicitor General. The relationship between the Commissioner and the Solicitor General has been described in the following terms by the Supreme Court of Canada in *R. v. Campbell and Shirose*, [1999] 1 S.C.R. 565, available at: www.canlii.org/en/ca/sec/doc/1999/1999canlii676/1999canlii676.html at 591:

“While for certain purposes the Commissioner of the RCMP reports to the Solicitor General, the Commissioner is not to be considered a servant or agent of the government while engaged in a criminal investigation. The Commissioner is not subject to political direction. Like every other police officer similarly engaged, he is answerable to the law and, no doubt, to his conscience”.

⁶⁶ [1968] 1 All E.R. 763 at 769 (C.A.).

DIRECTION BY THE PROSECUTOR

50. Law enforcement is a continuum. At one end, the police investigate criminal offences and arrange for suspected offenders to appear in court. At the other end, the Attorney General, through the DPP and Crown counsel, is responsible for neutrally and fairly presenting the Crown's case in court. Their roles are interdependent. While both have separate responsibilities in the criminal justice system, they must inevitably work in partnership to enforce criminal laws effectively.

51. The police have complete autonomy in deciding whom to investigate and for what suspected crimes. They also have the discretion to decide how to structure an investigation and which investigative tools to use.

However, prior to undertaking an investigation or in its early stages, investigators may wish to consult with federal prosecutors for advice and guidance as to how the investigation should be structured to ensure a sustainable prosecution. While the involvement of Crown counsel is not generally required as a matter of law at this stage, it has become increasingly apparent that it is desirable. Co-operation and effective consultation between the police and Crown counsel are essential to the proper administration of justice, as investigators are expected to gather evidence that is admissible and relevant to the charge. Later, when deciding whether to prosecute, consultation will often be helpful in assessing the sufficiency of the evidence and the public interest criteria.

52. The Attorney General of Canada (as represented by the DPP) considers that the following policy principles strike the appropriate balance between the role of the police and the role of Crown counsel before charges are laid:

Members of investigative agencies are entitled to investigate offences and carry out their duties in accordance with the law and general standards, practices and policies established by those agencies. During the investigation, investigators are entitled -- and encouraged -- to consult with Crown counsel about the evidence, the offence and proof of the case in court. At the end of the investigation, investigators are again entitled (and strongly encouraged in difficult cases) to consult with Crown counsel on the laying of charges. This consultation might include discussions about the strength of the case and the form and content of proposed charges. Ultimately, however, investigators have the discretion at law to commence any prosecution according to their best judgment, subject to statutory requirements for the consent of the Attorney General, and the authority of the Attorney General to stay proceedings if charges are laid. However, investigators may not give any undertaking to the accused or counsel for the accused about the conduct of the proceedings (concerning, for instance, conditions of bail, whether the charge will proceed or not) without first consulting Crown counsel.⁶⁷

- *What, if any, safeguards are in place (under law, regulation, policy or practice) to ensure the independence and impartiality of the various actors in the civilian justice system who might be involved in investigating and/or prosecuting possible LOAC violations? Is there any relevant case law?*

53. As stated in the section immediately above, maintaining the independence of the police from direct political control is fundamental to the Canadian system of law enforcement. Nor does the prosecution have any authority to direct the police in the investigative stages of the criminal justice process. This separation does not, however, preclude the police from consulting with the prosecution during the investigative stage.

⁶⁷ *The Federal Prosecution Service Deskbook*, c. 11, available at: www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/ch11.html.

54. Once charges are laid, full responsibility for the proceedings shifts to the Attorney General. On request, police have the responsibility to carry out further investigations that counsel believes are necessary to present the case fairly and effectively in court.

That said, the Supreme Court of Canada has indicated the Crown and the police are to be given some latitude in deciding how to structure their relationship. In *R. v Regan*, the Court stated: “Furthermore, while the police tasks of investigation and charge-laying must remain distinct and independent from the Crown role of prosecution, I do not think it is the role of this Court to make a pronouncement on the details of the practice of how that separation must be maintained.”⁶⁸ Some jurisdictions have entered into Memorandums of Understanding delineating the respective responsibilities.⁶⁹

55. The gravity of the power to bring, manage and terminate prosecutions which lies at the heart of the Attorney General’s role has given rise to an expectation that he or she will be fully independent from the political pressures of the government. “It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions”.⁷⁰ This seminal concept of the Crown as “Minister of Justice” was originally expressed by the Supreme Court of Canada in *Boucher v. The Queen*, in which Rand J. explained, at pp. 23-24:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that

68 [2001] 1 S.C.R. 297, para. 64, available at: www.canlii.org/en/ca/scc/doc/2002/2002scc12/2002scc12.html.

69 See, for example, Memorandum Of Understanding Between The Royal Canadian Mounted Police And The Federal Prosecution Service, available at: www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/mou.html.

70 *Law Society of Alberta v. Krieger*, supra note 54.

all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.⁷¹

- *If a matter is subject to both a public inquiry and a criminal investigation how does it proceed (criminal first/concurrent investigation, etc.)?*

56. In general, there is no legal prohibition to concurrent public inquiries and criminal proceedings, including investigation. However, by proceeding concurrently the “government” runs the risk of irreparably compromising the criminal trial. If the government wishes to take every possible precaution to ensure that there is no risk to the criminal trials, then it could choose to halt, delay, or limit the powers of the public inquiry. To follow this latter course, however, involves the inevitable risk that the public will lose faith both in the government’s ability and willingness to get at the truth and in the political system as a whole. The choice is the government’s and as a general rule, the Courts must respect the government’s decision.⁷²

57. Two concurrent investigations into the alleged abuse of Afghan detainees in Canadian Forces custody serve as an example of how this issue has been managed in a Canadian Forces context. Recognizing that the successful prosecution of a potential offender might be jeopardized if witnesses and/or real evidence were inadvertently compromised by actions taken by any parallel, administrative investigation i.e. the Military Police Complaints Commission (MPCC) public interest investigation, the MPCC and the CFNIS entered into a protocol for the conduct of parallel investigations. The terms of this protocol included the CFNIS agreeing

71 [1955] S.C.R. 16, available at: www.canlii.org/en/ca/scc/doc/1954/1954canlii3/1954canlii3.html.

72 *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, available at: www.canlii.org/en/ca/scc/doc/1995/1995canlii86/1995canlii86.html.

to provide the MPCC with copies of documents and material obtained in the context of its investigation (subject to the MPCC holding all material received in confidence) and the MPCC agreeing not to conduct any interviews with witnesses until either the CFNIS investigation was concluded, or the CFNIS consented to the conduct of the particular interview by the MPCC.

- *Are there specific laws applicable to members of civilian security services? If so, please briefly describe them.*

58. While it is possible that civilian security services personnel could be present on the battlefield and commit LOAC violations, there are no unique laws applicable to such personnel. They, like any other civilian in an operational theatre, are subject to the *Code of Service Discipline* if they are accompanying any unit or element of the Canadian Forces, are serving with the Canadian Forces under an engagement with the Minister of National Defence or they have agreed to be subject to the *Code*. If not, LOAC violations can only be prosecuted in the civilian courts.

MILITARY JUSTICE SYSTEM

- *What breaches of LOAC fall under military law?*

59. CF members are to subject to be charged with any offence enumerated in the *Code of Service Discipline*, the *Criminal Code* or any other Act of the Parliament of Canada, all of which could include breaches of LOAC. For example, Canada has implemented LOAC obligations domestically through a variety of Statutes including the *Geneva Conventions Act* and the *Crimes Against Humanity and War Crimes Act*. As well, breaches of the *Code of Conduct for CF Personnel* could result in charges being laid under section 129 of the *National Defence Act*. Pursuant to section 132 of the *National Defence Act*, if the offence takes place outside Canada, Canadian Forces members are also subject to being charged for any offence under the law applicable in that location.

- *What options are available under military law for the investigation of possible LOAC violations (e.g., criminal investigations, boards of inquiry, operational command or unit level investigations)?*

60. The *Queens Regulations & Orders*⁷³ authorize, and in some instances require, the conduct of an investigation. The nature of the matter to be investigated determines the scope and type of investigation as well as who authorizes and conducts the investigation. In general, investigations can be categorized into two types - administrative and disciplinary. There are no publicly available specific rules or policies on the preservation of evidence in particular circumstances.

73 Available at: www.admfincs.forces.gc.ca/qro-orf/index-eng.asp.

DISCIPLINARY INVESTIGATIONS

61. Disciplinary investigations are conducted pursuant to *QR&O* Chapter 106 (Investigation

of Service Offences) to determine whether a service offence has been committed. The purpose of investigating a service offence is to reconstruct events, gather evidence, identify elements of the alleged offence and identify those responsible.⁷⁴ An investigation shall be conducted when a complaint is made or where there are other reasons to believe that a service offence may have been committed. The investigation shall be conducted as soon as practical to determine whether there are sufficient grounds to justify the laying of a charge.⁷⁵ As a minimum, the investigation must collect all reasonably available evidence bearing on the guilt or innocence of the person who is the subject of the investigation.⁷⁶

The type of investigation conducted is dependent upon the nature of the offence and the gravity or sensitivity of the matter.

A. Canadian Forces National Investigation Service (CFNIS) Investigations

62. The CFNIS plays an important role in the military justice system with respect to both the investigation and the laying of charges. The mandate of the CFNIS is to provide the Department of National Defence and the CF with an efficient, accountable, investigative and independent criminal investigation service in Canada and abroad in support of the military justice system.⁷⁷ The CFNIS will normally investigate offences of

⁷⁴ *QR&O* 106.02 Note B, available at: www.admfincs.forces.gc.ca/qro-orf/vol-02/index-eng.asp (hereinafter: *QR&O*).

⁷⁵ *Id.*, at 106.02(1).

⁷⁶ *Id.*, at 106.03.

⁷⁷ *Military Police Policies and Technical Procedures*, A-SJ-100-004/AG-000, Chapter 6, Annex A,

a serious and sensitive nature. In general, a serious or sensitive offence is one which, by the nature of the allegation, or through those who are, or may be implicated, could have a strategic or national impact.⁷⁸ CFNIS investigations are the most likely type of investigation to be employed in the investigation of allegations of LOAC violations.

B. Civilian Police Investigations

63. In some circumstances, allegations of LOAC may be initially reported to the civilian police. The circumstances of the incident, the interests of military discipline, and whether the military or civilian agencies have better resources to accomplish the task will dictate whether the investigation proceeds in the military or civilian justice system.

C. Base/Wing Military Police Investigations

64. Base/Wing military police can conduct investigation in relation to offences that involve either Canadian Forces members or, in some cases, civilians. The military police have the jurisdiction to investigate any non-serious or non-sensitive offence. Examples of such offences are found in Appendix 2 and 3 to Annex A of Chapter 6 of the *Military Police Policies and Technical Procedures*.⁷⁹ In addition, they may also have jurisdiction over serious and sensitive offences over which the CFNIS has waived jurisdiction.

D. Unit Investigations

65. Although the military police have jurisdiction to investigate any

para. 1. Found at Annex C to *Military Justice at the Summary Trial Level* B-GG-005-027/AF-001, available at: www.forces.gc.ca/jag/publications/Training-formation/MilJustice_JustMilv2.2-eng.pdf (hereinafter: *Military Police Policies*).

78 *Id.*, at chapter 6, para. 24.

79 *Id.*

service offence over which the CFNIS does not take jurisdiction, there are circumstances when disciplinary investigations will be undertaken by the unit authorities pursuant to *QR&O* Chapter 106 (Investigation of Service Offences). The circumstances of the offence as well as the seriousness of the offence, complexity of the investigation and location of the unit having regard to the availability of military police resources, are factors to be considered in determining whether the unit or the military police should conduct the investigation. Units have traditionally assumed responsibility for conducting investigations into minor breaches of discipline.⁸⁰

Administrative Investigations

66. Commanders at all levels must be able to conduct investigations for the effective and efficient administration of their units. In general, these investigations are categorized as administrative investigations. While the term ‘administrative investigation’ is not defined in either the *National Defence Act* or the *QR&Os*, administrative investigations are used to investigate issues related to the command, control and administration of the CF. Three types of administrative investigations could be used to investigate alleged LOAC violations; informal investigations, summary investigations (SI), and boards of inquiry (BOI).

67. The *National Defence Act*⁸¹ only addresses the convening of a BOI to inquire into any matter that is connected to the government, discipline, administration or functions of the CF, as well as any matter that affects an officer or non-commissioned member. *QR&O* 21.01 (Summary Investigations - General) authorizes and defines an SI as “an investigation, other than a board of inquiry, ordered by the CDS, an officer commanding a command or formation, or a commanding officer.” The notion of an informal investigation is premised on the residual command authority

⁸⁰ *Id.*, at paras. 11-12.

⁸¹ *Revised Statutes of Canada*, *supra* note 5, at s. 45(1).

vested in those who command units, formations or elements within the CF. Informal investigations do not have terms of reference like an SI or BOI. They permit a CO to maintain situational awareness until an appropriate course of action is determined (i.e. the required type of investigation is ascertained).

68. The decision to conduct an SI or a BOI must be premised on the “Primary Purpose Test” that is articulated in DAOD 7002-1 (Boards of Inquiry) and DAOD 7002-2 (Summary Investigations).⁸² Neither an SI nor a BOI can be convened “if the sole or primary purpose is to obtain evidence for a disciplinary purpose or to assign criminal responsibility.” The Terms of Reference cannot require determinations of criminal liability and information obtained from an individual must not be premised on being able to obtain self-incriminating evidence.

69. Administrative investigations must be clearly distinguished from disciplinary investigations. When conducting an administrative investigation, if the investigator or board encounters evidence relating to a possible criminal or disciplinary offence, the investigator must stop the investigation and consult with the unit legal adviser in order to avoid potential difficulties that otherwise might ensue.⁸³

- *Can civilians be the subject of such investigations?*

70. Civilians are subject to the Canadian military law when they accompany any unit or element of the Canadian Forces⁸⁴ or while serving with the Canadian Forces under an engagement with the Minister of National Defence and they have agreed to be subject to the Code.⁸⁵

82 Available at: www.admfincs.forces.gc.ca/dao-doa/index-eng.asp (hereinafter: DAOD).

83 *Military Administrative Law Manual*, *supra* note 41, at c. 3.

84 *Revised Statutes of Canada*, *supra* note 5, at s. 61.

85 *Id.*, at ss. 60(1)(f) and (j).

- *Provide a general description of the structure of the military justice system and the role of military courts, prosecution authority (including any military AG/JAG or similar authority) and military police regarding the investigation and prosecution of breaches of LOAC?*

INVESTIGATION

71. Military police jurisdiction is derived from a number of sources, including the *National Defence Act* and the *Criminal Code*. In one respect, it is the widest law enforcement jurisdiction possible, in that it covers those subject to the *Code of Service Discipline*, no matter where they are in the world. On the other hand, it is often geographically limited, in that it is only triggered by incidents occurring on, in or in relation to a Defence Establishment, work or material (when dealing with those not subject to the *Code of Service Discipline*).

72. The role of the military police in the investigation of breaches of LOAC has been fully canvassed at [61]-[62], [64] above.

PROSECUTION

73. The military justice system has a two-tiered tribunal structure that includes the summary trial system (where most disciplinary matters are dealt with) and the more formal court martial system.

74. All complaints that result in charges are dealt with by either the summary trial or court martial processes. A charge is a formal accusation that a person subject to the *Code of Service Discipline* has committed a service offence. A charge is considered to be laid once it has been reduced to writing on the appropriate form and signed by a person authorized to lay charges. Unit authorities, i.e. commanding officers and officers and

non-commissioned members authorized by a commanding officer to lay charges, and members of the CFNIS have the power to lay charges. Matters investigated by the base/wing military police are referred to the unit for the laying of charges.

75. The discretion to lay a charge rests with these authorized authorities. Charges should be laid unless there are some legitimate and compelling public interest reasons why jurisdiction ought not to be exercised in a particular case. Authorized authorities will normally be in the best position to assess public interest reasons and, in particular, what the interests of unit discipline require. Members who are authorized to lay charges are required to obtain legal advice before laying most charges (i.e. for all charges where a court martial election must be offered). Legal advice encompasses the sufficiency of the evidence, whether or not in the circumstances a charge should be laid, and, if so, the appropriate charge to be laid.

76. Once a charge is laid, the member, including a member of the CFNIS, who has laid the charge must refer it to either the accused's CO, the CO of the base, unit or element in which the accused is present when the charge was laid, or to a delegated officer (an officer of the rank of captain or above designed by their CO to act in this capacity with limited jurisdiction in respect of the rank of the accused and the nature of the charge and with limited powers of punishment). Each officer to whom a charge has been referred must then determine if they have the jurisdiction to act as a presiding officer at a summary trial for the offence charged, based on a number of factors. Provided the alleged offence is one which they have jurisdiction to try, the rank of the accused does not preclude them from doing so and they have not conducted or supervised the investigation, laid or caused the charges to be laid nor issued a search warrant in the matter, they have the discretion to try an accused. In exercising this discretion, potential presiding officers must consider whether their powers of punishment are adequate, having regard to the gravity of the offence

(for example, the maximum punishment that may be imposed at summary trial by a CO is 30 days detention), the accused has not elected to be tried by court martial, whether it is inappropriate for the officer to try the case having regard to the interests of justice and discipline and they have no reasonable grounds to believe the accused was unfit to stand trial or was suffering from a mental disorder when the alleged offence was committed.

A. Summary Trials

77. The purposes of a summary trial are as follows:

- to provide prompt, fair justice in respect of minor service offences; and
- to contribute to the maintenance of military discipline and efficiency in Canada and abroad, in peacetime and during armed conflicts.

Once jurisdiction exists to conduct a summary trial, it may be held wherever the unit is located. Generally, summary trials are conducted across Canada, at sea in Her Majesty's Canadian ships, and in various locations during operations abroad.

78. When a CF member is charged with an offence under the *Code of Service Discipline*, the summary trial process usually permits the case to be tried and disposed of in the unit, by unit authorities (COs, superior commanders (if the accused is below the rank of lieutenant colonel and above the rank of sergeant) or delegated offices.) During a summary trial, the accused is provided with an assisting officer. The primary functions of an assisting officer are to assist the accused in the preparation of his or her case and to assist and the accused during the trial to the extent desired by the accused.

79. Although the summary trial is still the overwhelmingly predominant form of service tribunal, not all service offences can be dealt with at summary trial. The *Queens Regulations & Orders (QR&O)* lists the offences that can be dealt with at summary trial. Some offences, including offences against the *Crimes Against Humanity and War Crimes Act*, the *Geneva Convention Act* and most *Criminal Code* offences charged pursuant to section 130 of the *National Defence Act (NDA)*, must be tried by court martial.

B. Right to be Tried by Court Martial

80. Accused member have the right to elect trial by court martial in relation to the vast majority of service offences. In effect, the accused must be offered an election unless he or she is facing only a “minor disciplinary” charge or the offence is one that must be dealt with at court martial. The *QR&O* specify when an accused has the right to elect to be tried by court martial, and under what circumstances an accused is not provided the opportunity to choose.

C. Referral to Court Martial

81. When the service offence charged requires trial by court martial, an accused has elected to be tried by court martial, or the commanding officer has determined that due to the nature of the offence the matter is most appropriately dealt with by court martial, the charge is referred to a referral authority. The term “referral authority” applies only to those specific officers in the accused’s chain of command who have been legally empowered to refer a charge to the Director of Military Prosecutions (DMP) for the purposes of determining whether a matter warrants trial by court martial.

Upon receipt of an application to proceed with a charge, the referral authority must:

- forward the application to the DMP, adding any recommendations regarding the disposition of the charge that are deemed appropriate (including any recommendation to proceed or not proceed with a charge); or
- direct a commanding officer or superior commander to try the accused by summary trial on the existing charges, but only in circumstances where the referring officer had referred the charge because he or she believed his or her powers of punishment were not adequate to try the accused by summary trial and the referral authority does not share this opinion.

Thus in most cases, when a charge has been referred to a referral authority, he or she must forward the charge to the DMP, with any recommendations that the officer considers appropriate.

D. Role of DMP in Court Martial Process

82. The DMP is responsible for:

- deciding whether a particular charge is suitable for trial by court martial; and
- conducting prosecutions at courts martial.

Upon receipt of a referral, the DMP initially undertakes a review of the charge. Two main issues are considered:

- the sufficiency of the evidence required to demonstrate a reasonable prospect of conviction in respect of the charges laid or yet to be laid; and
- where there is sufficient evidence, whether or not the public

interest and the interests of the CF require the initiation of a prosecution.

Following a review of the charge, the DMP will determine whether or not a charge should be dealt with at court martial and will notify the referral authority, of the accused, his/her commanding officer, his/her legal counsel, the Director of Defence Counsel Services (DDCS) and the JAG of this decision. For offences that can be dealt with at summary trial, the DMP can refer a charge to an officer with jurisdiction to try the accused by summary trial when the DMP is satisfied the charge should not be proceeded with by Court Martial, except when the accused has elected trial by Court Martial. As well, the DMP may require additional investigation into a matter.

On the other hand, where the decision is made to pursue a charge, the DMP will prefer the charge by preparing and signing a charge sheet and refer the charge to the Court Martial Administrator, who will then convene a court martial. In addition, the DMP can modify charges or prefer any other charges supported by evidence.

E. Courts Martial

83. The court martial, a formal military court presided over by a military judge, is designed to deal with more serious offences, and is conducted in accordance with rules and procedures similar to those followed in civilian criminal courts while maintaining the military character of the proceedings. Like summary trials, courts martial may be held anywhere in the world. Statutorily, courts martial have the same rights, powers and privileges as a superior court of criminal jurisdiction with respect to all “matters necessary or proper for the due exercise of its jurisdiction,” including the attendance, swearing and examination of witnesses, the production and inspection of documents, and the enforcement of its orders.

84. At a court martial, the prosecution is conducted by a legal officer from the office of the DMP. The accused is entitled to be represented free of charge by a legal officer from Defence Counsel Services or, at his or her own expense, by a civilian lawyer. CF members who meet the qualifying criteria may also take advantage of provincial Legal Aid programs.

F. Types of Court Martial

85. The *NDA* provides for two types of court martial:

- the General Court Martial; and
- the Standing Court Martial;

The General Court Martial is comprised of a military judge and a panel of CF members. The panel of CF members is roughly analogous to a jury in a civilian criminal court and is composed of five members. When the accused is an officer, the court martial panel consists entirely of officers. When the accused is a non-commissioned member, the panel must include two non-commissioned members at or above the rank of warrant officer or petty officer first class. The panel is responsible for the finding on the charges (i.e. guilty or not guilty) and the military judge makes all legal rulings and imposes the sentence.

The Standing Court Martial is conducted by a military judge sitting alone who is responsible for the finding on the charges and imposing a sentence if the accused is found guilty.

86. The method of determining the type of court martial is based on the nature of the offence and in some cases by the choice of the accused person. In general, a General Court Martial will be convened for serious offenses that are punishable by imprisonment for life while a Standing Court

Martial will be convened for relatively minor offences that are punishable by imprisonment for less than two years or a punishment that is lower in the scale of punishments or are punishable by summary conviction under any Act of Parliament. In all other cases, the accused person has the right to choose between trial by General or Standing Court Martial.⁸⁶

- *What is the basis for jurisdiction over LOAC breaches under military law (territoriality, nationality, passive personality, protective jurisdiction)?*

87. Jurisdiction over all offences under Canadian military law is based on the status of the individual i.e. being subject to the *Code of Service Discipline*, no matter where the activity occurs.

- *Who is subject to military law? Can military jurisdiction be exercised over civilians and if so under what circumstances?*

88. A person may be tried in the Canadian military justice system if that individual is subject to the *Code of Service Discipline*. The *National Defence Act* provides that a wide range of persons are subject to the *Code of Service Discipline* including:

- a. members of the CF, both regular and reserve force;⁸⁷
- b. members of a “special force” established by the CF;⁸⁸
- c. members of foreign armed forces attached or seconded to the CF;⁸⁹

86 This information has been taken from the JAG website: www.forces.gc.ca/jag/justice/structure-eng.asp.

87 *Revised Statutes of Canada*, *supra* note 5, at ss. 60(1) (a) and (c). Members of the reserve force are not subject to the *Code of Service Discipline* at all times.

88 *Id.*, s. 60(1) (b). Pursuant to s. 16 of the *NDA*, the Government of Canada may establish a component of the CF, known as a “special force,” for any action undertaken by Canada under the *United Nations Charter*, *North Atlantic Treaty* or any other similar instrument for collective defence entered into by Canada.

89 *Id.*, at s. 60(1) (d).

- d. persons attending certain educational institutions⁹⁰; and
- e. alleged spies for the enemy.⁹¹

The following persons, many of whom will be civilians and who would not otherwise be subject to the *Code of Service Discipline*, are also subject to it and to trial by the military justice system:

- a. persons serving in the positions of officers or NCMs of any force raised and maintained by Canada outside of its territory;⁹²
 - b. persons who accompany any unit or other element of the CF that is on service or active service anywhere;⁹³
 - c. persons who, in respect of any service offences committed or alleged to have been committed by them, are in civil custody or in service custody;⁹⁴ and
 - d. persons serving with the CF who have agreed under an engagement with the Minister of National Defence to be subject to the *Code of Service Discipline*.⁹⁵
- *What disciplinary or punitive actions can be taken when a violation of LOAC is determined to have occurred (e.g., censure, reprimand, discharge from the military, imprisonment)?*

89. Under military law the scale of punishments which can be imposed by service tribunals ranges from minor punishments to imprisonment for

90 *Id.*, at s. 60(1) (g).

91 *Id.*, at s. 60(1) (h).

92 *Id.*, at s. 60(1) (e) Note 6.

93 *Id.*, at s. 60(1) (f).

94 *Id.*, at s. 60(1) (i).

95 *Id.*, at s. 60(1) (j).

life.⁹⁶ The punishments that can be imposed at summary trial are limited to detention, reduction in rank, forfeiture of seniority, severe reprimand, reprimand, fine and minor punishment. Civilians can only be sentenced to a punishment of imprisonment or a fine.⁹⁷

- *Describe the leadership structure of the military legal system. If there is a military attorney general, JAG or equivalent person, what is the role of that individual? Does he/she provide advice to commanders, supervise the military legal system, oversee military justice? What are his/her authority within the military justice system and his/her relationship to military criminal investigators and other investigators?*

JAG

90. The *National Defence Act* identifies the position of the Judge Advocate General and provides for the qualifications, appointment and removal, term of office, rank, responsibilities, and key duties of the Judge Advocate General.⁹⁸ These key duties include:

- a. The JAG is the legal adviser to the Governor General, the Minister

96 *Id.*, at s. 139 (1)

s. 139(1) The following punishments may be imposed in respect of service offences and each of those punishments is a punishment less than every punishment preceding it:

- (a) imprisonment for life;
- (b) imprisonment for two years or more;
- (c) dismissal with disgrace from Her Majesty's service;
- (d) imprisonment for less than two years;
- (e) dismissal from Her Majesty's service;
- (f) detention;
- (g) reduction in rank;
- (h) forfeiture of seniority;
- (i) severe reprimand;
- (j) reprimand;
- (k) fine; and
- (l) minor punishments.

97 *Id.*, at ss. 166.1 and 175.

98 *Id.*, at ss. 9, 9.1, 9.2, 9.3 and 9.4.

of National Defence, the Department of National Defence (DND) and the Canadian Forces (CF) in matters relating to military law.

- b. The JAG is charged explicitly and specifically with the superintendence of the administration of the military justice system in the CF.

As advisor to the Governor General and the Minister of National Defence on matters related to military law, the JAG is, of course, consulted along with legal advisors from the Department of Justice and the Department of Foreign Affairs and International Trade on LOAC issues impacting the government of Canada.

91. The JAG exercises command over all officers and non-commissioned members (NCMs) posted to an established position within the Office of the JAG. The duties exercised by legal officers posted to a position within the Office of the JAG are determined by or under the authority of the JAG and, with respect to the performance of their duties, those legal officers are not subject to the command of any officer who is not a legal officer.⁹⁹ The JAG has no command relationship with military criminal or other investigators.

DIRECTOR OF MILITARY PROSECUTIONS

92. The Director of Military Prosecutions (DMP) is a legal officer appointed by the Minister for a renewable term of four years and is a barrister or advocate with at least 10 years standing at the bar of a province. As provided by the *National Defence Act*, the DMP is responsible for preferring all charges for trial by court martial, for the conduct of all prosecutions at court martial, and for representing the Minister on criminal

99 *Queens Regulations & Orders*, *supra* note 39, at art. 4.081(2).

appeals to the Court Martial Appeal Court of Canada and the Supreme Court of Canada.

In addition to these statutory responsibilities, the DMP provides legal advice in support of criminal and disciplinary investigations to the Canadian Forces National Investigation Service (CFNIS).¹⁰⁰

DIRECTOR OF DEFENCE COUNSEL SERVICES

93. The Director of Defence Counsel Services (DDCS) is an officer appointed by the Minister for a renewable term of four years and is a barrister or advocate with at least 10 years standing at the bar of a province. The DDCS provides, supervises and directs the provision of legal services to accused persons as defined in regulations. The DDCS is statutorily independent from other CF and DND authorities for the purpose of protecting the DDCS from potentially inappropriate influence. Legal officers assigned to DCS represent their clients in accordance with DDCS and JAG policies and their respective Code of Professional Conduct from their provincial or territorial law society. These safeguards are designed to preserve and enhance the legal and ethical obligations that DCS legal officers owe to the CF members they represent. Furthermore, communications with their clients are protected at law by solicitor-client privilege.¹⁰¹

¹⁰⁰ *Annual Report of the Judge Advocate General to the Minister of National Defence on the administration of military justice in the Canadian Forces*, 1 April 2008-31 March 2009, available at: www.forces.gc.ca/jag/publications/office-cabinet/AnnRep-RappAnn2009-eng.pdf (hereinafter: *JAG report 2009*).

¹⁰¹ *Id.*

OFFICE OF THE CHIEF MILITARY JUDGE

94. The Office of the Chief Military Judge is an independent unit of the Canadian Forces established in 1997. Its personnel include military judges, the Court Martial Administrator and the Deputy Court Martial Administrator, military and civilian court reporters and technical, financial, human resource and administrative support.

95. Military judges adjudicate at courts martial and other military proceedings such as the judicial review of persons held in pre-trial custody. The Court Martial Administrator convenes courts martial, selects panel members for courts martial, issues summonses to witnesses, and manages the Office. This is done with the assistance of the Deputy Court Martial Administrator and the support staff. The court reporters provide administrative services at courts martial and produce a record of proceedings of every court martial.

96. Military judges are appointed by the Governor in Council. Military judges are only removable by the Governor in Council upon the recommendation of an independent Inquiry Committee.

- *To whom does the aforementioned person report? What authority does that superior exercise over him or her?*

JAG

97. Although the JAG is responsive to the chain of command for the provision of legal services in the CF, he is responsible to the Minister of National Defence (MND) for the performance of his duties.¹⁰²

¹⁰² *Revised Statutes of Canada*, *supra* note 5, at s. 9.3(1).

DMP

98. The *National Defence Act* provides that the DMP acts under the general supervision of the JAG, and that the JAG may issue general instructions or guidelines to the DMP in respect of prosecutions in general or in relation to a particular prosecution. The JAG must give a copy of every such instruction to the MND. The DMP must ensure that such instructions are made available to the public, except in limited cases where the DMP decides that release to the public of an instruction or guideline would not be in the best interests of the administration of military justice.¹⁰³

DCS

99. Although, the DDCS acts under the general supervision of the JAG, the JAG is not authorized to issue instructions or guidelines in respect of a particular defence or court martial. The JAG, however, may issue general instructions or guidelines in writing in respect of defence counsel services.¹⁰⁴

- *What, if any, safeguards are in place (under law, regulation, policy or practice) to ensure the independence and impartiality of the various actors in the military who might be involved in the investigation or prosecution of alleged LOAC violations? Is there any relevant case law?*

DMP

100. In exercising prosecutorial discretion to prefer charges and conduct prosecutions, the independence of the DMP is protected by both the

¹⁰³ *Id.*, at s.165.17.

¹⁰⁴ *Id.*, at s. 249.2. The DDCS must make any general instructions or guidelines available to the public.

institutional structures found in the NDA¹⁰⁵ and the common law.¹⁰⁶ In this way, the role of the DMP is analogous to that of a Director of Public Prosecutions in the civilian criminal justice system.

MILITARY POLICE

101. Military police authority is derived from section 156 of the *National Defence Act*, section 2 of the *Criminal Code*, case law and a number of other acts and regulations. Military police policy states that MP investigations “shall not be influenced by the CF chain of command” and that “when exercising MP powers under the *NDA*, the individual MP member is held personally responsible”.¹⁰⁷ This position has been re-iterated and re-enforced by a recent letter from the Chief of Defence Staff wherein he declared that effective 1 April 2011 the CF Provost Marshal “is to assume full command of all military police who are directly involved in policing...”.¹⁰⁸ This letter was responding to the MPCC’s findings and recommendations on structural reforms to military police command and control, in the Afghan detainee public interest investigation.

102. The CFNIS is commanded by a Commanding Officer who reports directly to the Canadian Forces Provost Marshal. Regardless of the circumstance or environment, the members of the CFNIS remain under command of the CO CFNIS. The independence that results from this command relationship enables the CFNIS to conduct thorough

¹⁰⁵ *Id.*, at ss. 165.1-165.17.

¹⁰⁶ See *R. v. Power* [1994] 1 S.C.R. 601, available at: www.canlii.org/en/ca/scc/doc/1994/1994canlii126/1994canlii126.html, where the Court stated: “That courts have been extremely reluctant to interfere with prosecutorial discretion is clear from the case law. They have been so as a matter of principle based on the doctrine of separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice and the fact that prosecutorial discretion is especially ill-suited to judicial review”. Canadian courts have placed significant legal restrictions on the review of the exercise of prosecutorial discretion. Courts will undertake such reviews only in the clearest case of abuse of process. See as an example: *Law Society of Alberta v. Krieger*, *supra* note 54.

¹⁰⁷ *Military Police Policies*, *supra* note 77, at para. 7.

¹⁰⁸ Available at: www.mpcc-cppm.gc.ca/300/Afghanistan/2011-04-11-eng.aspx.

investigations without fear of influence from any command element.¹⁰⁹

103. All military police are subject to the Military Police Code of Conduct¹¹⁰ and are subject to oversight by the Military Police Professional Standards organization and the Military Police Complaints Commission (MPCC), a federal independent, quasi-judicial body.

MILITARY POLICE COMPLAINTS COMMISSION (MPCC)

104. The MPPC was established by the Government of Canada to provide oversight of the Canadian Forces military police effective December 1, 1999. This was achieved by creating a new Part IV to the *National Defence Act*, which sets out the mandate of the Commission and how complaints are handled.¹¹¹ Its role is to provide for greater public accountability by the military police and the chain of command in relation to military police investigations.

105. Part of the MPCC's mission is to discourage interference in any military police investigation. The Commission has sole jurisdiction to investigate interference complaints. Any member of the military police who conducts or supervises a military police investigation and believes a member of the CF or a senior official of the DND has interfered with, or attempted to influence, a military police investigation, may file a complaint with the Commission. This process recognizes the special situation of military police, who are both peace officers and members of the CF subject to military command.¹¹²

109 *The Canadian Forces National Investigation Service (CFNIS)*, available at: www.vcds.forces.gc.ca/cfpm-gpfc/cfp-ggp/nis-sne/index-eng.asp. Codification of this concept of independence from the chain of command was contained in Bill C-41, available at: www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5075119&File=33b), which died when the last Parliament was prorogued. The same legislation has not yet been reintroduced by the Government.

110 Available at: www.vcds.forces.gc.ca/cfpm-gpfc/apm-agp/dpm-gpa/pmcc-cdpm-eng.asp.

111 *Revised Statutes of Canada*, *supra* note 5, at ss. 250-250.53.

112 *Military Police Complaints Commission - Annual Report 2010*, available at: www.mpcc-cppm.

- *Do military investigating authorities act independently or are they subject to the direction of commanders, military legal officers, prosecutors or other actors?*

106. The only direction military investigative authorities are subject to is legitimate supervisory control by the Canadian Forces Provost Marshal's chain of command. The Director of Military Prosecutions, in the exercise of the Director's duties in respect of an individual case, may request that additional investigation be carried out.¹¹³

- *What is the role of the commander or other senior military personnel with regard to a possible LOAC violation? Are any limitations placed on their involvement? Do they shoulder any particular responsibilities?*

107. Under international law, a commander who is aware that subordinates or other persons under his control have committed a breach of LOAC is required to initiate such steps as are necessary to prevent violations of LOAC, and where appropriate, to initiate disciplinary action against these persons.

108. QR&O 4.02¹¹⁴ imposes an obligation on all offices to "report to proper authorities" any infringement of the law "when the officer cannot deal adequately with the matter." While there are circumstances where disciplinary investigations may be undertaken by unit authorities, this authority only exists for minor breaches of internal discipline.

Thus, a commander is normally required to report possible LOAC violations for investigation by either the military police or the CFNIS. Cases related

gc.ca/300/3000/2010/index-eng.aspx#toc.

113 *QR&O*, *supra* note 74, at 110.05.

114 *Queens Regulations & Orders*, *supra* note 39.

to possible LOAC violations are generally investigated by the CFNIS.¹¹⁵ Commanders are obliged to refrain from involving themselves in such an investigation once a CFNIS investigation is underway.

- *Is there civilian oversight over the military system and its various actors (e.g., courts, civilian attorney general)?*

MINISTER OF NATIONAL DEFENCE (MND)

109. Although the JAG is responsible for the superintendence of the military justice system, the JAG remains responsible to the MND in performance of the JAG's duties and functions and the MND remains responsible for the management and direction of the CF.¹¹⁶ Related to these responsibilities is the JAG's statutory mandate to conduct regular reviews and submit an annual report to the MND on the administration of military justice in the Canadian Forces.¹¹⁷

COURTS

A. Judicial Review

110. Judicial review is a legal remedy that is available to permit appropriate judicial and public scrutiny and ensure governmental adherence to the rule of law. Canadian courts have the jurisdiction to determine the legality of actions or review the decisions made by any military authority (including decisions made at summary trial), ranging from a unit CO to the Chief of Defence Staff. Judicial review refers to submitting "a decision or action to

115 See *Backgrounder for CFNIS investigation in detainee abuse*, available at: www.forces.gc.ca/site/news-nouvelles/news-nouvelles-eng.asp?cat=00&id=2787.

116 *Revised Statutes of Canada*, *supra* note 5, at s. 4.

117 *Id.*, at s. 9.3.

judicial scrutiny” whereby the decision or action may be set aside. Judicial review is potentially available through two means; by application to the Federal Court of Canada or by application to the superior court of the province where the decision was made or action taken. Judicial review is not the same as an appeal. It is the purpose of the judicial review to evaluate whether the decision maker has exceeded its jurisdictional limits.¹¹⁸

111. Judicial review of decisions to prosecute/not prosecute by DMP is also possible. However, as already noted above, Canadian courts have placed significant legal restrictions on the review of the exercise of prosecutorial discretion. Courts will undertake such reviews only in the clearest case of abuse of process constituting flagrant impropriety.

B. Appeals

112. Under the *NDA*, decisions rendered by courts martial are subject to two levels of appellate review. The first level of appeal is to the Court Martial Appeal Court (CMAC). The CMAC is authorized under the *National Defence Act (NDA)* to consider appeals brought forward by the MND or the person tried under the *NDA*. The second level of appeal is to the Supreme Court of Canada (SCC). A decision of the CMAC can be appealed to the SCC by the MND (as represented by the DMP) or the person tried in the circumstances set out in section 245 of the *NDA*.¹¹⁹

118 *Military Administrative Law Manual*, *supra* note 41, at c.2.

119 *JAG report 2009*, *supra* note 100.

APPLICATION OF THE POLICY IN PRACTICE

- *If the military and civilian systems both have jurisdiction over incidents involving possible LOAC violations, what criteria are used to determine which system handles the matter? Specifically, explain the interface between civilian and military systems in the investigation and prosecution of alleged breaches of LOAC.*

113. The response to this question has already been provided. Please refer to [1]-[4] above.

- *What are the reporting requirements regarding allegations of wrongdoing (e.g. are allegations reported, to what authority and in what time period)?*

QUEEN'S REGULATIONS AND ORDERS

114. *Queen's Regulations and Orders*¹²⁰ 4.02 and 5.01 set out the reporting requirements for offences in general. In essence, all officers and non-commissioned members must report the infringement of any rule or law by any person who is subject to the *Code of Service Discipline*. Any infringement shall be reported to the "proper authority". There are no time requirements for reporting these infringements. There are no specific reporting requirements for LOAC violations nor is there a definition of "proper authority". Reporting the incident to the chain of command or the police would meet the requirements of this regulation.

¹²⁰ *Queens Regulations & Orders*, *supra* note 39.

CODE OF CONDUCT

115. Rule 11 of the *Code of Conduct for CF Personnel*¹²¹ requires that any breaches of the LOAC be reported without delay. A breach can be reported to “superiors in the chain of command, the military police, a chaplain, a legal officer or any other person in authority.”

CRIMES AGAINST HUMANITY AND WAR CRIMES ACT

116. Sections 5(1)(c)(ii) & (2)(d)(ii) and 7(1)(c)(ii) & (2)(d)(ii) of the *Crimes Against Humanity and War Crimes Act*¹²² make it an indictable offence if a “military commander” or a “superior” “fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter [alleged war crimes, crimes against humanity or genocide] to the competent authorities for investigation and prosecution.”

THEATRE STANDING ORDERS

117. Joint Task Force Afghanistan Theatre Standing Order 304 (Significant incident Reporting) requires that “any significant incident be reported immediately”. Breaches of LOAC are not identified as a specific example of a “significant incident” in the annex attached to this order, but “actions by CF members that may undermine public values, or lead to the discredit of Canada at home or abroad” are included.¹²³

- *Can complaints of alleged LOAC violations be made directly to the military or civilian police?*

¹²¹ *CF Code of Conduct*, *supra* note 22.

¹²² *Statutes of Canada*, *supra* note 1.

¹²³ *DAOD 2008-3 (Issues and Crisis Management)*, *supra* note 82, which contains the same example.

118. Complaints of alleged LOAC violations can be made directly to military or civilian police, although the opportunity to report such violations to civilian police for soldiers deployed outside of Canada may be limited.

- *What is the policy regarding investigation of an alleged LOAC violation by military personnel? Who decides whether an operational inquiry (e.g. by unit military personnel) or criminal investigation is conducted?*

119. Commanders at all levels must be able to conduct investigations for the effective and efficient administration of their units. In general, these investigations are categorized as administrative investigations and are within the purview of the chain of command to order. Please refer to [66]-[69] above for a discussion of these types of investigations.

120. However, an administrative investigation cannot be convened “if the sole or primary purpose is to obtain evidence for a disciplinary purpose or to assign criminal responsibility.”¹²⁴ A disciplinary investigation must be initiated where the primary purpose of an investigation is to determine whether a service offence has been committed, identify the alleged offender or gather evidence for use in a subsequent disciplinary or criminal proceeding.

121. Disciplinary investigations are initiated for two main purposes: to enforce the *Code of Service Discipline* and to conduct criminal investigations under the aegis of the *Criminal Code* and other federal statutes. Canadian criminal and military law therefore govern how disciplinary investigations in the CF are carried out. The type of disciplinary investigation conducted (i.e., base/wing military police, CFNIS, or a unit disciplinary investigation), will depend upon the nature of the offence and the gravity or sensitivity of the matter. The general policy for determining which type of investigation

124 *DAOD 7002-1 (Boards of Inquiry) and DAOD 7002-2 (Summary Investigations)*, *supra* note 82.

will be carried out is set out in the *Military Police Investigations Policy*.¹²⁵ Please refer to [61]-[65] above for a discussion of these types of investigation.

- *Regarding such investigations, what are the criteria to launch an investigation or other inquiry (e.g. reasonable suspicion, belief that an offence has been committed, etc.)?*

122. *QR&O* 106.02 requires that “where a complaint is made or where there are other reasons to believe that a service offence may have been committed, an investigation shall be conducted as soon as possible” to determine whether there are sufficient grounds to lay a charge. Only frivolous or vexatious complaints need not be investigated.¹²⁶ The standard for laying a charge is a reasonable belief that an offence has been committed.¹²⁷

- *If an operational investigation or other inquiry is directed by the chain of command, is there a requirement to refer the matter for criminal investigation should it appear that a crime may have been committed? If so under what circumstances?*

123. *QR&Os* set out the criteria for launching a disciplinary investigation. When conducting an administrative investigation, if the investigator or board encounters evidence relating to a possible criminal or disciplinary offence, the investigator must stop the investigation and consult with the unit legal adviser in order to avoid potential difficulties that otherwise might ensue.

¹²⁵ *Military Police Policies*, *supra* note 77.

¹²⁶ *QR&O*, *supra* note 74.

¹²⁷ The legal standard for charging someone with an offence is quite different from launching an investigation. There is a legal requirement that the charge laying authority have reasonable and probable grounds to believe the suspect is guilty prior to laying a charge (*Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129, at para. 68, *available at*: www.canlii.org/en/ca/scc/doc/2007/2007scc41/2007scc41.html). However, since a prosecution is not legally sustainable unless there is evidence to support the accusation that a person subject to the *Code of Service Discipline* has committed a service offence, JAG has adopted a stricter standard for legal review of charges at the pre-charge stage. Such review will be conducted to determine if the evidence available gives rise to a reasonable prospect of conviction. *JAG Policy Directive 006/00 Professional Standards Review*, para. 12, *available at*: www.forces.gc.ca/jag/publications/directives/Directive010-00.pdf.

124. The decision to convene a Board of Inquiry (BOI) must be premised on the ‘primary purpose test’ that is articulated in Defence Administrative Orders and Directives (DAOD) 7002-1 (Boards of Inquiry).¹²⁸ A BOI must not be convened “if the sole or primary purpose is to obtain evidence for a disciplinary purpose or to assign criminal responsibility.” Notwithstanding that the *NDA* provides that a BOI may be used to investigate and report on “...any matter connected with the government, discipline, administration or functions of the CF...,” convening a BOI for a criminal or disciplinary purpose remains problematic because compelled evidence would not be admissible in a disciplinary proceeding.

DAOD 7002-1 addresses these concerns by prescribing the inclusion of a specific paragraph in the Terms of Reference. The requisite paragraph relates to the uncovering of evidence that indicates a service offence may have been committed:

Should the BOI receive evidence that it reasonably believes relates to an allegation of a criminal act or a breach of the *Code of Service Discipline*, the BOI shall adjourn, the convening authority shall be notified, and the matter shall be referred to the nearest JAG representative for advice.

- *What circumstances in cases involving civilian death or injury or damage to civilian property require that an investigation or inquiry be conducted? Is there a requirement that every death or every civilian death be investigated? Is this a legal requirement or one of policy? Does it extend to cases in which a military objective is attacked and collateral damage or incidental injury occurs?*

125. There is no specific requirement that mandates an investigation into civilian deaths or injury or damage to civilian property. However, in Afghanistan (as in many other theatres of operation), it is the invariable

¹²⁸ DAOD 7002-1 (Boards of Inquiry), *supra* note 82.

practice that Canadian commanders order the appropriate investigation, i.e. criminal/disciplinary or administrative, in all cases of death or injury, including collateral death injury or death. The CFNIS mandate to investigate serious and sensitive matters means that they are the investigatory body, at least until a determination can be made that no criminal/disciplinary culpability exists.

126. Property damage is not always investigated if the facts are clear or the damage is slight. Often, the Canadian Forces makes an ex gratia¹²⁹ payment to innocent civilians who are injured or whose property is damaged by Canadian Forces operations. Likewise, ex gratia payments may be made to next of kin where an innocent civilian has been killed in the course of Canadian Forces operations.¹³⁰

127. These investigations into civilian death or injury or damage to civilian property serve a different purpose and are separate from operational briefings, “hot washes” or other processes that focus on issues related to whether the operation was optimally conducted.

- *What access do affected civilians, including non-citizens and residents of other countries, have to the investigation, its results and any court proceedings?*

COURT PROCEEDINGS

128. The open court principle is one of the hallmarks of Canadian democratic society, fostering public confidence in the integrity of the court

129 Ex gratia payment means a benevolent payment made to anyone in the public interest by the Crown under the authority of the Governor in Council for loss or expenditure incurred for which there is no legal liability on the part of the Crown. DAOD 7004-0 (Claims By or Against the Crown and Ex gratia Payments), *supra* note 82.

130 This information was provided by the Joint Task Force Afghanistan Senior Legal Officer to the author of this report.

system and understanding of the administration of justice.¹³¹ This principle is subject only to the *Dagenais*¹³²/*Mentuck* test whereby the Supreme Court of Canada had ruled that the open court principle may only be modified when “necessary to prevent a serious risk to the proper administration of justice, because reasonable alternative measures will not prevent the risk, and when the salutary effects of the publication ban [or other restrictions on the open court principle] outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice”.¹³³

Thus, most court proceedings are open to the public and many proceedings are publically reported.

INVESTIGATIONS

A. Criminal Investigations

129. The Government of Canada holds documents containing information on government business and activities, as well as personal information on Canadian citizens. This information includes criminal investigation reports. The *Access to Information Act (AIA)*¹³⁴ provides the public with the means of obtaining records held by government institutions. The general principle with respect to disclosure of government information is to provide the information to the public on request. However, there are exemptions provided for by the legislation. The *Act* also provides for an independent

131 *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, available at: www.canlii.org/en/ca/scc/doc/1996/1996canlii184/1996canlii184.html.

132 *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, available at: www.canlii.org/en/ca/scc/doc/1994/1994canlii39/1994canlii39.html.

133 *R. v. Mentuck*, [2001] 3 S.C.R. 442, available at: www.canlii.org/en/ca/scc/doc/2001/2001scc76/2001scc76.html.

134 R.S.C., c. A-1, available at: <http://laws-lois.justice.gc.ca/eng/acts/A-1/index.html>.

review by the Information Commissioner (IC) or the Federal Court of Canada (FCC) with respect to any refusal to disclose information.

130. In order to be an applicant and entitled to make a request for the release of records under the *AIA*, the applicant must be a Canadian citizen or a permanent resident as defined in subsection 2(1) of the *Immigration and Refugee Protection Act (IRPA)* and must be present in Canada at the time of the request. Section 16 of the *AIA* provides an exemption from disclosure for records relating to law enforcement and investigations, investigative techniques and plans for lawful investigations, criminal methods and techniques, etc.¹³⁵ This exemption includes law enforcement

135 *Id.*, section 16 provides:

“(1) The head of a government institution may refuse to disclose any record requested under this Act that contains

(a) information obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to

(i) the detection, prevention or suppression of crime,

(ii) the enforcement of any law of Canada or a province, or

(iii) activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*,

if the record came into existence less than twenty years prior to the request;

(b) information relating to investigative techniques or plans for specific lawful investigations;

(c) information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

(i) relating to the existence or nature of a particular investigation,

(ii) that would reveal the identity of a confidential source of information, or

(iii) that was obtained or prepared in the course of an investigation; or

(d) information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.

Security

(2) The head of a government institution may refuse to disclose any record requested under this Act that contains information that could reasonably be expected to facilitate the commission of an offence, including, without restricting the generality of the foregoing, any such information

(a) on criminal methods or techniques;

(b) that is technical information relating to weapons or potential weapons; or

(c) on the vulnerability of particular buildings or other structures or systems, including computer or communication systems, or methods employed to protect such buildings or other structures or systems.

Policing services for provinces or municipalities

(3) The head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained or prepared by the Royal Canadian Mounted Police while performing policing services for a province or municipality pursuant to an arrangement made under section 20 of the *Royal Canadian Mounted Police Act*, where the Government of Canada has, on the request of the province or municipality agreed not to disclose such information.

investigations conducted by the RCMP, Base/Wing military police and the CFNIS.

131. In addition, any person on whom personal information is held by the government is entitled to be given access to their information held in personal information banks and to other personal information about themselves under the control of a government institution, provided the applicant can provide enough information to locate the record.¹³⁶ As with the *AIA*, in order to be an applicant and, therefore, entitled to make a request for the release of records pursuant to the *Privacy Act (PA)*, the applicant must be either a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *IRPA*. Civilians affected by LOAC violations and who met the citizenship or residency requirement of the *PA* would likely qualify as an applicant.

132. Like the *AIA*, the *PA* provides an exemption for records relating to law enforcement and investigations, investigative techniques and plans for lawful investigations, criminal methods and techniques, etc. Section 22(1)¹³⁷

Definition of “investigation”

- (4) For the purposes of paragraphs (1)(b) and (c), “investigation” means an investigation that
- (a) pertains to the administration or enforcement of an Act of Parliament;
 - (b) is authorized by or pursuant to an Act of Parliament; or
 - (c) is within a class of investigations specified in the regulations”.

136 *Privacy Act*, R.S.C., 1985, c. P-21, available at: <http://laws-lois.justice.gc.ca/eng/acts/P-21/page-8.html>.

137 *Id.*, section 22(1) provides:

“(1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1)

(a) that was obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to

(i) the detection, prevention or suppression of crime,

(ii) the enforcement of any law of Canada or a province, or

(iii) activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*,

if the information came into existence less than twenty years prior to the request;

(b) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

(i) relating to the existence or nature of a particular investigation,

of the *PA* is a discretionary exemption that applies to law enforcement and investigations and is similar to that found in section 16 of the *AIA*. Authorities may refuse to disclose any personal information that was obtained or prepared by the government institution during an investigation whose purpose was to detect, prevent or suppress crime, enforce Canadian laws, or investigate activities that are suspected of constituting a threat to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*. In order to deny disclosure, it must be determined that the disclosure will reasonably be expected to be injurious to the enforcement of Canadian laws, the conduct of investigations, or the security of penal institutions.¹³⁸

B. Public Inquiries

133. Inquiries conducted under the *Inquiries Act* are normally open to the public.

C. Boards of Inquiry

134. BOIs are internal investigations and, as such, the public and the media are almost always excluded. However, because BOIs are government

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- (ii) that would reveal the identity of a confidential source of information, or
 - (iii) that was obtained or prepared in the course of an investigation; or
 - (c) the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.

Policing services for provinces or municipalities

(2) The head of a government institution shall refuse to disclose any personal information requested under subsection 12(1) that was obtained or prepared by the Royal Canadian Mounted Police while performing policing services for a province or municipality pursuant to an arrangement made under section 20 of the *Royal Canadian Mounted Police Act*, where the Government of Canada has, on the request of the province or municipality, agreed not to disclose such information.

Definition of “investigation”

- (3) For the purposes of paragraph (1)(b), “investigation” means an investigation that
- (a) pertains to the administration or enforcement of an Act of Parliament;
 - (b) is authorized by or pursuant to an Act of Parliament; or
 - (c) is within a class of investigations specified in the regulations”.

138 *Military Administrative Law Manual*, *supra* note 41, at c. 9.

records, the minutes of a BOI are subject to the provisions of the *PA* and *AIA*. While there are exemption provisions in the *AIA* for “ongoing investigations” (see above), once a BOI has concluded and the minutes have been submitted to the convening authority, much of the information in the minutes may be released to the public unless the BOI was conducted and the minutes were prepared in contemplation of litigation.¹³⁹

- *What role, if any, do human rights groups have in the initiation or conduct of any inquiry into alleged LOAC violations?*

135. Although there are no formal arrangements in place as to where, how or to whom complaints may be made, human rights groups can and do play a role in the initiation and conduct of inquiries into alleged LOAC violations. The most recent and high profile Canadian example is a complaint related to the alleged abuse of three detainees by CF members in April 2006 in Afghanistan. Four different investigations/proceedings have flowed from the complaint registered by Amnesty International Canada and British Columbia Civil Liberties Association.

- CFNIS Investigation: “Operation Camel Spider” (CFNIS name for investigation) involved an investigation into the alleged abuse of three detainees by CF members in April 2006 in Afghanistan. The investigation was initiated following a complaint to the Military Police Complaints Commission (MPCC).

The first allegation investigated was whether any of the detainees were abused. The investigation found no evidence that any of the three detainees were mistreated or abused during capture, detention or transfer to Afghan authorities. The investigation also found that the injuries sustained by one of the detainees were the result of that individual engaging one of the CF members and trying to seize a weapon. In light

¹³⁹ *Id.*, at c. 4.

of the circumstances it was concluded that CF personnel applied reasonable force within the scope of their duties and acted in accordance with the Rules of Engagement. The second detainee sustained minor scrapes when he attempted to escape by jumping over a steep embankment. These injuries were sustained prior to their transfer to the military police. The third detainee sustained no injuries during the course of his capture.

The second allegation investigated was whether the three detainees were afforded proper medical care by the CF. The investigation found compelling evidence that all three of the detainees were provided appropriate medical care throughout the entire period they were in custody of the CF.

The third allegation investigated was whether the military police should have initiated an investigation into the cause of the detainees' injuries. After an extensive investigation into this allegation, the CFNIS concluded that no reasonable grounds existed to support charges under the *National Defence Act*. The Military Police Complaints Commission is addressing the professional conduct of the members of the military police as part of their separate investigation.¹⁴⁰

- Board of Inquiry: The Vice Chief of Defence Staff (VCDS) convened a Board of Inquiry (BOI) to investigate the circumstances surrounding the alleged incident and to make recommendations as to the requirement for any changes to orders, directives, procedures and training as outlined in the Convening Orders.¹⁴¹
- The Military Police Complaints Commission (MPCC): On

¹⁴⁰ 2008 CFNIS Annual Report, available at: www.vcds.forces.gc.ca/cfpm-gpfc/cfp-ggpf/nis-sne/arra/2008/rep-rap-2008-eng.asp#si-ei (hereinafter: 2008 CFNIS Annual Report).

¹⁴¹ The BOI report available at: www.vcds.forces.gc.ca/boi-cde/ihd-tdt/index-eng.asp.

February 9, 2007, the Military Police Complaints Commission (MPCC) launched a public interest investigation into allegations involving military police personnel serving at the Joint Task Force Afghanistan base at Kandahar Airfield (KAF) in the Kandahar province of Afghanistan. This decision related to a formal complaint received by the Commission on January 29, 2007. The complainant cited evidence of possible abuse of individuals apprehended by members of the Canadian Forces (CF) in April 2006 in the Kandahar Region of Afghanistan, which the military police are alleged to have not investigated, nor provided appropriate medical care.¹⁴² Of particular note is the MPCC finding that there had been a failure to investigate the injuries of one of the detainees.

- *Amnesty International Canada and the British Columbia Civil Liberties Association v. Canada (Chief of the Defence Staff)*.¹⁴³ Amnesty International Canada and the British Columbia Civil Liberties Association brought an application for judicial review with respect to “the transfers, or potential transfers, of individuals detained by the Canadian Forces deployed in the Islamic Republic of Afghanistan.”

They alleged that the formal arrangements which have been entered into by Canada and Afghanistan did not provide adequate substantive or procedural safeguards to ensure that individuals transferred into the custody of the Afghan authorities, as well as those who may be transferred into the custody of third countries, were not exposed to a substantial risk of torture. They asked for a declaration that sections of the *Canadian Charter of Rights and Freedoms* apply to individuals detained by the Canadian Forces in Afghanistan. A writ of

142 A copy of the final report can be found at *Afghanistan Public interest Investigation*, available at: www.mpcc-cppm.gc.ca/300/afghanistan/index-eng.aspx.

143 [2008] 4 F.C.R. 546, available at: www.canlii.org/en/ca/fct/doc/2008/2008fc336/2008fc336.html.

prohibition preventing the transfer of detainees captured by the Canadian Forces to Afghan authorities, or to the custody of any other country, until such time as adequate substantive and procedural safeguards have been put into place was also sought.

The application for judicial review relied entirely on the *Canadian Charter of Rights and Freedoms* legal foundation. The parties thus agreed that if the *Charter* did not apply to the conduct of the Canadian Forces in issue in this case, it necessarily followed that the application for judicial review must be dismissed. The application was denied both at the Federal Court level and on appeal to the Federal Court of Appeal.

- *Please provide available statistics regarding the investigation (or other inquiries) and prosecution of alleged LOAC violations (e.g. numbers of complaints, matters investigated, charges laid, non-judicial action, trials, verdicts -- include civil and military).*

CIVIL

A. Investigations

136. The Canadian Crimes Against Humanity and War Crimes Program produces and distributes annual reports which provide the only public war crimes file inventory available.¹⁴⁴ This inventory provides a summary of war crimes program statistics including investigations. Unfortunately, there is little information on types of matters investigated other than a few case samples.

¹⁴⁴ Annual reports from 1998 to 2006-2007, available at: www.justice.gc.ca/warcrimes-crimesdeguerre/researchreports-rechercherapports-eng.asp.

The eleventh annual report (2007-2008) available at: www.rcmp-grc.gc.ca/pubs/wc-cg-eng.htm.

B. Prosecutions

137. The first prosecution under the *Crimes Against Humanity and War Crimes Act* resulted in the conviction of Desire Munyaneza for genocide, crimes against humanity, and war crimes in relation to events that occurred in Rwanda in 1994. Mr. Munyaneza received a life sentence on October 29, 2009.¹⁴⁵ An appeal is pending. A second prosecution under the *Act* is now underway. On November 6, 2009, Jacque Mungwarere was arrested and charged with genocide.¹⁴⁶

MILITARY

A. Investigations

138. The CFNIS produces annual reports as well.¹⁴⁷ These reports also provide a summary of investigations conducted by the CFNIS during the reporting period. However, they do not provide specific statistics related to war crimes investigations. Nor are these statistics available as the CFNIS does not compile their statistics to reflect war crimes investigations.¹⁴⁸

139. A review of publically available news reports does indicate one investigation into the allegations that a Canadian was involved in the 2006 shooting death of an Afghan who had his hands up in the act of surrender. That probe ended without any charges.¹⁴⁹ There is also the investigation with respect to the complaint registered by Amnesty International Canada

¹⁴⁵ *R. c. Munyaneza*, 2009 QCCS 4865 (CanLII), available at: www.canlii.org/en/qc/qccs/doc/2009/2009qccs4865/2009qccs4865.html.

¹⁴⁶ *PPSC Report 2009-2010*, *supra* note 62.

¹⁴⁷ Annual Reports for 2006-2008, available at: www.vcds.forces.gc.ca/cfpm-gpfc/cfp-ggp/nis-sne/ar-ra/index-eng.asp.

¹⁴⁸ Discussion with Director/Military Justice Policy & Research and author of this report.

¹⁴⁹ CBC news report (Dec. 2, 2010), available at: www.cbc.ca/news/canada/story/2010/12/01/canada-jtf2-investigation.html.

and British Columbia Civil Liberties Association discussed at [135] above.¹⁵⁰

140. The summary trial database contains data about each charge laid in the military justice system that has proceeded to trial by way of summary trial. The information in this database is collected from Records of Disciplinary Proceedings (RDPs). The Directorate of Law/Military Justice Policy and Research (DLaw/MJP&R) within the Office of the JAG is responsible for collecting the relevant information from each RDP, which is used to populate the database.

141. Statistics relating to courts martial are generated using information gathered and retained in the Courts Martial Reporting System (CMRS) database. The CMRS is a proprietary database system written and maintained by the JAG Informatics department. The responsibility for entering the data and ensuring the accuracy of the information contained in the CMRS resides with DLaw/MJP&R. Information is provided to DLaw/MJP&R by the Canadian Military Prosecution Service (CMPS) in the course of their handling of charges referred to the Director of Military Prosecutions (DMP) by the chain of command.¹⁵¹

142. Annex A to this report is a collation of the information contained in the summary trial database and the CMRS database provided to me by the staff at MJP&R in response to this question. It also includes information provided to me from records in Task Force Afghanistan Senior Legal Officer's office. Please note that Annex A includes offences that were committed during all international operations, including operations where Canada was not a party to an armed conflict. These offences have been included because of the CF policy that "the CF will apply, as a minimum, the spirit and principles of the LOAC in all Canadian military operations

¹⁵⁰ 2008 CFNIS Annual Report, *supra* note 140.

¹⁵¹ JAG report 2009, *supra* note 100.

other than domestic operations”.¹⁵²

- *Have any senior military or security service personnel or senior government officials been investigated or prosecuted for possible LOAC violations, or for being responsible for such violations (e.g. by ordering, approving, tolerating, ignoring or covering up violations)?*

143. Although not specifically mandated to investigate LOAC violations by senior officials, the hearings being conducted by the Special Committee on the Canadian Mission in Afghanistan into the transfer of Afghan detainees by Canadian Forces personnel could be characterized as a preliminary investigation of this type.¹⁵³

- *What, if any, examples are available concerning investigations or other inquiries of alleged LOAC violations regarding the following types of incidents (indicate their outcome).*

1. Theft/assault or alleged mistreatment of civilians (not taking a direct part in hostilities);

144. See Annex A for particulars on the court martial of Capt Rainville.

2. Mistreatment of detainees including during interrogation;

145. See Annex A for particulars on the courts martial of Pte Brown, Capt Sox, MCpl Matchee, Sgt Boland, Sgt Gresty, Maj Seward and Pte Brocklebank and Capt Langlois.

¹⁵² *Use of Force for CF Operations*, *supra* note 28, at c.1, para. 8.

¹⁵³ The Special Committee's decision to include in its mandate the transfer of detainees issue is recorded in its Minutes of Proceedings (Nov. 4, 2009), *available at*: www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4214560&Language=E&Mode=1&Parl=40&Ses=2. Transcripts of the most recent hearings into this issue *available at*: www.parl.gc.ca/CommitteeBusiness/CommitteeMeetings.aspx?Cmte=AFGH&Stac=3037825&Language=E&Mode=1&Parl=40&Ses=3.

Also see remarks on the investigation “Operation Camel Spider” (CFNIS name for investigation) which involved an investigation into the alleged abuse of three detainees by CF members in April 2006 in Afghanistan. (at [135] of this report)

3. Use of force while assisting in the maintenance of law and order (either directly or in support of police forces) in occupied territories;

146. None.

4. Use of force while seeking to arrest or detain a civilian taking a direct part in hostilities;

147. None.

5. Use of force at a checkpoint or during a similar operation;

148. See Annex A for particulars on the court martial of Sgt Hunter.

6. The targeting of civilians taking a direct part in hostilities;

149. None.

7. Use of force against a member of an organized armed group or terrorist organization in the context of an armed conflict;

150. See Annex A for particulars on the court martial of Capt Semrau.

Also see the remarks on the investigation into the allegations that a Canadian was involved in the 2006 shooting death of an Afghan who

had his hands up in the act of surrender. That probe ended without any charges. (at [139] of this report)

10. Use of force against enemy which resulted in collateral civilian casualties;

151. No specific information is available with respect to investigations of this type, although the information provided by the Joint Task Force Afghanistan Senior Legal Advisor (See note 130) would indicate that such investigations have taken place but have not resulted in charges.

11. Any other relevant case.

152. None.

Year of CM	Rank	Name	Location of incident	# NDA Charge	Sentence	Punishment	Summary of Facts
1993	Pte	Brown	Somalia	s.130 NDA (Murder) s.130 NDA (Torture)	Guilt of both	5 years imprisonment + Dismissal with Disgrace from Her Majesty's service	The Brown was convicted of the 16 March 1993 torture and murder of Shidan Arone, a Somali youth, who died as a result of a beating he received while detained by CF personnel
1994	LCol	Mathieu	Somalia	s.124 NDA Negligent performance of duty	Not Guilty		<p>LCol Mathieu was charged, in connection with the death of Shidan Arone, with negligent performance of duty as a result of orders allegedly given on the use of deadly force, contrary to the Rules of Engagement (ROE).</p> <p>The Prosecution argued that LCol Mathieu's interpretation of and instructions on the ROE was negligent, in that they confused the criminal intent of looters with the hostile intent addressed in the ROE, that they authorized the use of deadly force against fleeing thieves, and that they ignored the concepts of proportionality and disengagement in responding to threats</p>
1995	Capt	Sox	Somalia	s.130 NDA (Unlawfully causing bodily harm) s.124 NDA Negligent performance of duty s.129 NDA Act to the prejudice of good order and discipline	Guilt of Charge # 2	Reduction in Rank to Lt + Severe reprimand	Capt Sox was convicted, in connection with the death of Shidan Arone, of negligent performance of duty for passing on instructions that captured infiltrators to the Canadian camp could be abused

Year of CM	Rank	Name	Location of incident	# NDA Charge	Sentence	Punishment	Summary of Facts
2000	MCpl	Matchee	Somalia	s.130 NDA (Murder) s.130 NDA (Torture)	Charges withdrawn		MCpl Matchee was declared unfit to stand trial as a result of a suicide attempt. He tried to hang himself after being arrested and suffered serious brain damage. Charges were withdrawn on Sep. 15, 2008 on public interest considerations including the fact that Mr. Matchee has a permanent brain injury and will never be fit to stand trial
1994	Sgt	Boland	Somalia	s. 130 NDA (Torture) s. 124 NDA Negligent performance of duty	Guilty of Charge # 2	1 year imprisonment + Dismissal from the CF	Sgt Boland was on guard duty in the bunker when MCpl Matchee reportedly assaulted the prisoner, Shidan Arone, and on leaving allegedly said "just don't kill him"
1994	Sgt	Gresty	Somalia	s. 124 NDA Negligent performance of duty x 2	Not Guilty		Sgt Gresty was the duty officer in the Command Post, just over 80 feet from the bunker where the beating and torture of Shidan Arone took place, but had not responded when allegedly told of the treatment of the prisoner
1994	Maj	Seward	Somalia	s. 130 NDA (Unlawfully Causing Bodily Harm) s. 124 Negligent performance of duty	Guilty of Charge # 2	3 months imprisonment + Dismissal from the CF	Major Seward gave instructions to his subordinates to abuse intruders
1994	Pte	Brocklebank	Somalia	s. 130 NDA (Torture) s. 124 NDA Negligent performance of duty	Not Guilty		The Prosecution argued that Pte Brocklebank had a legal duty to protect civilians in his care from acts of violence, that a reasonable soldier would not have watched as a 16 year old youth was beaten and tortured, and he had assisted in the torture by handing MCpl Matchee his loaded pistol and holding Shidan Arone's feet during the assault by MCpl Matchee

Year of CM	Rank	Name	Location of incident	# NDA Charge	Sentence	Punishment	Summary of Facts
1994	Capt	Rainville	Somalia	s. 130 NDA (Unlawfully Causing Bodily Harm) s. 124 Negligent performance of duty	Not Guilty		Capt Rainville was charged in relation to an incident on Mar. 4, 1993 in which one Somali national was killed and a second one was wounded. Capt Rainville was acquitted on the basis of instructions he had received from a superior officer to the effect that any breach of the camp perimeter would be considered a hostile act and the soldiers could shoot to wound thieves
2000	Capt	Langlois	Haiti	s.129 NDA Conduct to the prejudice of good order and discipline X 2 s.130 NDA (Uttering a Threat) s.130 NDA (Assault with a weapon) X 3	Charges stayed		The two charges related to allegations that Capt Langlois ordered members of his infantry company to "intimidate" detainees contrary to the ROE. The charges were stayed as a result of a successful unreasonable delay motion by the defence
2001	Sgt	Hunter	Kosovo	s.87 NDA Pointing a firearm X 3 s.91(1) NDA Unauthorized possession of a firearm s.129 NDA Conduct to the prejudice of good order and discipline	Guilty of 5 charges	Reduction in Rank to Cpl + Firearms prohibition 5 years	Two of the charges that Sgt Hunter was convicted of related to incidents at vehicle checkpoints. During the first incident Sgt Hunter pointed a firearm at a civilian driver stopped at the checkpoint and then fired a round over the roof of the vehicle, when the driver complained about being stopped. The second incident was similar in nature but in that case he pointed his service pistol at the driver of a civilian vehicle while the driver was outside the vehicle
2010	Capt	Semrau	Afghanistan	s. 130 NDA (Murder) s.130 NDA (Attempt to Commit Murder by Using Firearm) s.93 NDA Cruel or disgraceful conduct s.124 NDA Negligent performance of duty	Guilty of charge # 3	Dismissal from Her Majesty's Service + Reduction in Rank 2Lt	All 4 charges related to an incident where an injured, unarmed prisoner was shot by Capt Semrau

Year of CM	Rank	Name	Location of incident	# NDA Charge	Sentence	Punishment	Summary of Facts
Mar. 10, 2010	Capt	Grapp	Afghanistan	s.129 NDA Conduct to the prejudice of good order and discipline	Charge Stayed		Failed to comply with the CF Code of Conduct document B-GJ-005-104/FP-023 para 23 by taking personal property to wit: a headdress of a deceased person
Dec. 23, 2008	Capt	Grapp	Afghanistan	s.129 NDA Conduct to the prejudice of good order and discipline	Guilty	Fine \$200.00	Failed to comply with Theatre Standing Order 108, entitled artifacts/trophies of war, by taking personal property to wit: a headdress of a deceased person
Jan. 25, 2009	MCpl	Roy	Afghanistan	s.129 NDA Conduct to the prejudice of good order and discipline	Guilty	Fine \$800.00	Opened fire on a first aid provider, without authorization
Feb. 12, 2008	Cpl	Beaucage	Afghanistan	s.129 NDA Conduct to the prejudice of good order and discipline	Charge Stayed		Possession of a human skull
Sep. 9, 2009	Cpl	Beaucage	Afghanistan	s.129 NDA Conduct to the prejudice of good order and discipline	Guilty	Reprimand	Causing an indignity to a human skull by drawing a design on it
Sep. 9, 2009	Cpl	Bergeron	Afghanistan	s.129 NDA Conduct to the prejudice of good order and discipline	Charge Stayed		Possession of a human skull

Year of CM	Rank	Name	Location of incident	# NDA Charge	Sentence	Punishment	Summary of Facts
Sep. 3, 2009	Cpl	Bergeron	Afghanistan	s.129 NDA Conduct to the prejudice of good order and discipline	Guilty	Reprimand + Fine \$500	Causing an indignity to a human skull by drawing a design on it
Sep. 3, 2009	Cpl	Poirier	Afghanistan	s.129 NDA Conduct to the prejudice of good order and discipline	Charge Stayed		Possession of a human skull
Sep. 3, 2009	Cpl	Poirier	Afghanistan	s.129 NDA Conduct to the prejudice of good order and discipline	Guilty	Reprimand	Causing an indignity to a human skull by drawing a design on it
Apr. 9, 2010	WO	Bailey	Afghanistan	s.130 NDA Assault causing bodily harm	Not Guilty		On Mar. 6, 2009 at Kabul did in committing an assault on Mr. ZA, cause bodily harm to him
Jun. 2, 2009	Pte	Gagne	Afghanistan	s.93 NDA Cruel or disgraceful conduct	Guilty	Detention 7 Days	Threw a bottle of urine at an Afghan boy and made a gesture for him to drink it
Feb. 4, 2011	Cpl	Roberge	Afghanistan	s.93 NDA Cruel or disgraceful conduct	Guilty	Detention 7 Days + Reduction in rank to Pte	While in the rear of a vehicle in a convoy, he threw eggs at local Afghans

AUSTRALIAN LAW AND PRACTICE RELEVANT TO INVESTIGATION AND PROSECUTION OF LOAC VIOLATIONS

Tim McCormack*

GENERAL

A. Please provide a general description of the national system for investigating and prosecuting alleged LOAC violations. In particular, describe whether such cases are handled by the civilian or military justice systems.

1. The Australian military justice system is currently in flux. Major amendments made in 2006 have been reversed following a ruling in 2009 that the centrepiece of the proposed new regime, the Australian Military Court, was unconstitutional. Following this ruling, Australia reverted to the court martial system formerly in place. However, further changes are expected in future and draft legislation for extensive reform is listed for introduction to Parliament.

This section provides general information about the Australian legislative provisions relevant to the law of armed conflict, and then about the history and present state of the military justice system.

It should be noted that there have been very few allegations of violations of the law of armed conflict (LOAC) against members of the Australian Defence Force (ADF), so there is little concrete precedent in the area of investigations or prosecutions (see [83]-[85]below). Moreover, while there has been significant debate about the appropriate form of the

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military justice system, this debate has generally focused on how best to protect the rights of members of the ADF (as both alleged wrongdoers, and as victims) while maintaining military discipline, rather than on any need for greater responsiveness to allegations of wrongdoing perpetrated by members of the ADF against civilians or other individuals outside the ADF.

LEGISLATION RELEVANT TO LOAC

2. In Australian law, international legal obligations - treaty-based or customary - do not create enforceable rights and obligations in the absence of implementing legislation.¹ Accordingly, no international crimes, including customary international crimes (even crimes with *jus cogens* status) may be prosecuted in Australian courts in the absence of implementing legislation.

3. In 1945 Australia enacted the *War Crimes Act 1945* to facilitate the prosecution of Japanese defendants for war crimes allegedly perpetrated during WWII before Australian military tribunals. More than 800 Japanese defendants were tried in a total of 300 trials between 1945 and 1951.

In 1987 the *War Crimes Act 1945* was amended to allow for the prosecution of alleged former Nazis now living in Australia for war crimes committed in Europe between 1 September 1939 and 8 May 1945. In the early 1990s, criminal proceedings were initiated against three individuals but for various evidentiary and health-related reasons, none of those proceedings produced a criminal conviction. Given the passage of time, this legislation is unlikely to play any significant role in future.

¹ Australia is a federal polity in which the Commonwealth (federal) legislature only has power to make laws with respect to certain enumerated heads of power, including naval and military defence, and external affairs. *Unless otherwise signaled, legislation referred to in this report is Commonwealth legislation.*

Prior to 2002 and Australia's ratification of the *Rome Statute of the International Criminal Court (Rome Statute)*, the *Geneva Conventions Act 1957* (amended in 2001 following Australian ratification of the *Additional Protocols*) was the principal legislative basis for the prosecution of general violations of LOAC. In the 54 years since the adoption of the legislation, there has never been a prosecution - either civilian or military - pursuant to that legislation.

4. In 2002, Australia ratified the *Rome Statute* and passed implementing legislation: the *International Criminal Court Act 2002* and *International Criminal Court (Consequential Amendments) Act 2002*. The latter amends the federal *Criminal Code Act 1995* by introducing a new Division 268 that criminalises all offences covered by arts 6, 7 and 8 of the *Rome Statute*, and renders the *Geneva Conventions Act 1957* otiose after the date of entry into force of the amending legislation (Jul. 1, 2002).

Division 268 of the *Criminal Code Act 1995*, containing all ICC offences, applies regardless of whether the conduct constituting the offence, or the results of the offence, occur in Australia.² It thus extends, on its own terms, to the acts of ADF members (and civilians) abroad. Most other criminal law does not have extra-territorial operation. However, the *Defence Force Discipline Act 1982 (DFDA)* provides, in effect, for extra-territorial application of Australian criminal law to the acts of ADF members and certain other individuals whenever and wherever they are deployed, by rendering an offence against the criminal law committed overseas a "service offence" under the *DFDA* (for further detail, see [30] below).

Currently, the military justice system has primary jurisdiction in respect of "service offences". Subject to constitutional restrictions on the ability of the federal Government to oust the jurisdiction of state Supreme

² *Criminal Code Act 1995*, art. 15.4; 268.117(1).

Courts, a civil court has no jurisdiction to try service offences, or to try offences that are ancillary to service offences. Civil courts, however, retain jurisdiction to try charges of offences against the generally applicable laws of the Commonwealth, States and Territories.³

Accordingly, where an ADF member engages in conduct overseas that would constitute a criminal offence of some kind under a law applying in the ACT not having extra-territorial application (if the conduct were committed in Australia), this conduct will nevertheless constitute a service offence and be rendered criminal by s 61 of the *DFDA*.⁴ Civil courts have no statutory jurisdiction in respect of such service offences. However, the Director of Military Prosecutions retains the discretion to refer a serious case to the relevant civilian authority.

5. On May 22, 2007 the Director of Military Prosecutions (DMP) signed a Memorandum of Understanding (MoU) with all nine Australian Directors of Public Prosecutions (DsPP) (Federal, State and Territory).⁵ Paragraph 35(b) of that MoU states that:

The DMP will consult the relevant DPP:

(b) where the DMP is of the view that, while the alleged conduct is a breach of service discipline, it may also constitute an offence which should be dealt with by the civilian justice system.

Paragraph 36 of the MoU provides a list of indicative offences included in the scope of Paragraph 35(b). Examples relevant to this report include the following:

3 *Defence Force Discipline Act*, art. 190 (hereinafter: *DFDA*); The exclusive jurisdiction of the military justice system in respect of 'service offences' is subject to the consent of the Director of Public Prosecutions in respect of certain offences under Commonwealth law that are committed within Australia: art. 63.

4 Leaving aside the criminal law of the territory in which the conduct occurred (as to which see [30]).

5 The Memorandum of Understanding is a publicly available document but inaccessible online; Copy on file with the author of the Report.

Matters where the alleged conduct is of a such a serious nature that the public interest may best be served by prosecution of the alleged offender in a civilian criminal Court, including matters where the alleged offence:

- is a war crime other than provided in the [DFDA];
- [relates to] Australia's international obligations, such as obligations under relevant international treaties, for example, in relation to alleged war crimes;
- [involves a victim who is] not an ADF member and the interests of justice require that the matter be dealt with in the criminal justice system;
- [has] a high public profile or [is] likely to attract substantial public interest (including media comment).

6. In cases where criminal laws do, on their own terms, apply extra-territorially (as with Division 268 of the *Criminal Code Act 1995*), the conduct of ADF members outside Australia may constitute both a "service offence" and an offence against the generally applicable laws of the Commonwealth. In such a case the military justice system and civil courts would both have jurisdiction and given that any such offence would be at least as serious as the examples listed in paragraph 35(b) of the MoU, it could be expected that the DMP would defer to the Commonwealth DPP to prosecute the alleged offences in the civilian courts.

AUSTRALIA'S MILITARY JUSTICE SYSTEM

7. Australia's military justice system has historically been modeled on that of the United Kingdom, involving courts martial for more serious offences. This remains the case today. However, there have been initiatives to have serious offences tried before a standing court empowered to reach final verdicts and sentences. Following an abortive attempt to make this

change in 2006, further reforms are expected to occur in the coming years.

The military justice system is based on the *DFDA* (as amended from time to time). The introduction of this legislation in 1982 overhauled the system of military justice in some respects, but preserved central features of the existing courts martial regime. In particular, courts martial were convened within the chain of command and, once concluded, proceedings were reviewed by a reviewing authority in the chain of command empowered to, among other things, quash the conviction. This could only be done in circumstances similar to those which would ground a criminal appeal in the civil courts (for example, where the conviction was unreasonable or could not be supported by the evidence), and reviewing authorities were required to take, and were bound by, advice from a legal officer. Most punishment also required the approval of a reviewing authority. The effect of the powers of the reviewing authority was that conviction, along with final decisions on punishment, remained within the chain of command.⁶

8. In 2003, following several inquiries into the military justice system, and amid concerns that the system was not sufficiently protective of the rights of ADF members, the Senate Foreign Affairs, Defence and Trade References Committee was charged with a wide-ranging inquiry into the effectiveness of the Australian military justice system in providing impartial, rigorous and fair outcomes. The terms of reference also included consideration of the impact of other Government initiatives to improve the military justice system, including the establishment of the office of Inspector General of the ADF,⁷ and a proposed office of Director of Military Prosecutions (then in existence on the basis of Defence instructions, but not yet established in statute).⁸

6 See generally the descriptions of the court martial system prior to 2006 given in *Lane v Morrison* (2009) 239 CLR 230; [2009] HCA 29 (Aug. 26, 2009) at [45], [89]-[90].

7 Now in place: see [66] below.

8 Senate Foreign Affairs, Defence and Trade References Committee, *The Effectiveness of Australia's Military Justice System* (June 2005), Chapter 1 [1.4]; on the DMP, Chapter 2 [2.32] (available at: www.aph.gov.au/senate/committee/fadt_ctte/completed_inquiries/2004-07/miljustice/report/index).

The Committee made several significant recommendations. One recommendation was that offences against the generally applicable criminal law, or offences having a close counterpart in the generally applicable criminal law, be removed from the military justice system altogether. The Committee recommended that they be referred, instead, to the civilian police (State police or, on deployment, the Australian Federal Police) for investigation, and, if necessary, to the appropriate Director of Public Prosecutions for prosecution in the civil courts.⁹ Even if this were implemented, the Committee noted that cases might be referred back to the military justice system, and that, in any event, the military justice system would still be required to investigate and prosecute service offences. Influenced in part by the fact that the role played by the chain of command in disciplinary proceedings in the UK and Canada had been held to violate the right to a fair trial,¹⁰ as well as by the general trend towards removing adjudicatory processes from the chain of command, the Committee recommended the creation of a permanent military court empowered to reach binding verdicts and sentences. In order to ensure independence and impartiality, the Committee recommended that this court comply with constitutional requirements for courts exercising the judicial power of the Commonwealth.¹¹

9. The Government rejected the recommendation that all offences against the generally applicable criminal law, or closely analogous to offences against the generally applicable criminal law, be referred to civilian police and prosecutorial authorities. This was based on a view that recourse to the civilian courts to deal with matters that substantially affect service discipline would be, as a general rule, inadequate to serve the particular disciplinary needs of the ADF, and that retaining an

htm) (hereinafter: *Senate Committee report*).

9 *Senate Committee report, supra* note 8, at chapter 3 [3.119], [3.121]. The committee also recommended other steps to increase the capacity of the service police, including consideration of a joint service investigative capacity: Chapter 3 [3.130]-[3.133].

10 *Findlay v United Kingdom* (1997) 24 EHRR 221; *R v G  n  reux* [1992] 1 SCR 259.

11 *Senate Committee report, supra* note 8, at chapter 5, esp [5.94]-[5.95].

investigative and prosecutorial capacity was necessary to support ADF operations.¹² The Government did, however, take up recommendations to increase the capacity of the service police and to create a joint service investigative capacity (building on steps already taken prior to the Senate Committee report, and leading to the establishment of the Australian Defence Force Investigative Service).¹³

The Government also agreed to create a permanent military court to ensure independence of military justice processes from the chain of command. However, the Government did not believe that creating a “Chapter III court” - one compliant with constitutional requirements concerning appointment, remuneration and tenure of judges - was consistent with the need to have a bench that understood the military operational and administrative environment, could sit in theatre and on operations, be deployable and have credibility with ADF members. The Government believed that a *sui generis* court created by statute to fulfil these needs would be constitutionally valid provided that it exercised jurisdiction only where proceedings could reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline.¹⁴

10. The *Defence Legislation Amendment Act 2006* amended the *DFDA* to, among other things, create the Australian Military Court in accordance with the Government’s plan. However, shortly after the Australian Military Court came into existence, a challenge to the constitutionality of the provisions creating the Court arose. The case came before the High Court of Australia and the provisions creating the Australian Military Court were struck down as unconstitutional.¹⁵

12 Department of Defence, *Government Response to the Senate Foreign Affairs, Defence and Trade References Committee, Report on the Effectiveness of Australia’s Military Justice System*, at 14 (hereinafter: *Government Response*).

13 *Government Response*, *supra* note 12, at 2-3; On ADFIS, see further [51] below.

14 *Government Response*, *supra* note 12, at 15-16.

15 The fact that the new Australian Military Court, unlike courts martial, would make decisions that were binding in their own right, not subject to review or confirmation by the chain of command, led the High Court of Australia to the conclusion that the Australian Military Court was purporting to

In accordance with the decision of the High Court, convictions of the Australian Military Court during its two year existence were invalid and of no effect, although legislation was subsequently passed to give effect to punishments (other than imprisonment) that had been imposed.¹⁶

11. Following the ruling, the Government reverted, on an interim basis, to the system of courts martial and Defence Force magistrates in place prior to the 2006 reforms.¹⁷ This forms the core of the current system of military justice, described in more detail in other sections of this report. Basically, less serious offences may be tried before “summary authorities” (officers in the chain of command), and more serious offences are tried before courts martial or Defence Force magistrates. Convictions are subject to automatic review by “reviewing authorities” (officers appointed by the Chief of the Defence Force or a service chief, who are only competent to review proceedings if they were not themselves involved in laying charges), and most punishments do not take effect unless approved by a competent reviewing authority.

Major changes to the military justice system are expected in future. A *Military Court of Australia Bill* (creating a new Military Court of Australia, compliant with the Constitution, to take up the role played by the defunct Australian Military Court) was introduced into Parliament in 2010, but lapsed when Parliament was prorogued, and has not yet been

exercise the judicial power of the Commonwealth, rather than some other power concerned only with maintenance of military discipline: *Lane v Morrison* (2009) 239 CLR 230; [2009] HCA 29 (Aug. 26, 2009) at [51],[98]. This conclusion was confirmed by the fact that the Australian Military Court was designated as a ‘court of record’, with the effect that conviction or acquittal before the Australian Military Court on charges of a ‘service offence’ (including, as discussed above, conduct that would violate generally applicable criminal law) would preclude any subsequent prosecution in the civil courts for substantially the same offence: at [112]. Any court purporting to exercise the judicial power of the Commonwealth must comply with constitutional requirements, and it was clear that the Australian Military Court did not comply with requirements concerning appointment and tenure.

16 *Military Justice (Interim Measures) Act (No. 2) 2009*. See also Department of Defence, *Military Justice Reform* (available at: www.defence.gov.au/mjs/reform.htm) (hereinafter: *DoD Military Justice Reform*). The constitutional validity of this legislation was recently tested before the High Court of Australia, and the Court upheld the impugned provisions: *Nicholas v The Commonwealth* [2011] HCA 29 (Aug. 10, 2011).

17 *Military Justice (Interim Measures) Act (No 1) 2009*. See also *DoD Military Justice Reform*, *supra* note 16.

reintroduced. The then Federal Attorney-General indicated his intention to reintroduce the Bill for debate and enactment in the Spring 2011 Parliamentary Session.¹⁸ New legislation was recently passed to preserve some of the offices under the interim arrangements for a further two years.¹⁹

B. *What acts are considered breaches of the LOAC?*

12. LOAC consists of various international conventions and treaties, as well as customary international norms, that regulate the conduct of military hostilities. The Australian Government has ratified or acceded to all major LOAC treaties and also accepts that it is bound by relevant customary norms of LOAC.

Australia has criminalised certain violations of LOAC (notably those which are covered by art 8 of the *Rome Statute*). While some other violations of LOAC not covered by art 8 and not criminalised pursuant to Australian law might also constitute serious violations of LOAC (e.g. disproportionate military force in a non-international armed conflict), any such additional serious violations do not currently constitute crimes prosecutable before Australian courts. However, if a member of the ADF committed any such serious violation of LOAC, it would be open to the Director of Military Prosecutions or to the Commonwealth Director of Public Prosecutions to lay charges of “ordinary” domestic offences to ensure that the behaviour did not go unpunished.

13. As a matter of prosecutorial policy, the Director of Military Prosecutions or Director of Public Prosecutions may choose not to bring charges of specific war crimes pursuant to Division 268 but to lay charges involving “ordinary” domestic crimes instead. This is a policy approach already adopted by the US, UK and Canada and has been explained by

18 See www.dpmc.gov.au/parliamentary/docs/proposed_legislation.pdf, for proposed legislation.

19 *Military Justice (Interim Measures) Amendment Act 2011*.

each of those Australian military allies on the basis of two complementary factors: (1) it is easier for the prosecution to discharge its evidentiary burden where it is not required to prove a contextual element of the offence (e.g. that it was an international or non-international armed conflict); and (2) it may be more difficult to secure a conviction for war crimes than for “ordinary” domestic crimes (such as murder) because of the stigma attached to war crimes.²⁰

The Australian Government also acknowledges that neither art 8 of the *Rome Statute* nor the relevant provisions of Division 268 of the *Criminal Code Act 1995* represent an exhaustive implementation of all violations of LOAC. Some violations are not serious violations, do not constitute war crimes and do not attract criminal sanction. However, these violations may be charged as disciplinary offences under the *DFDA*.

C. *What breaches of LOAC are considered to be war crimes? Is the source of the designation as a “war crime” found in legislation or case law? Please elaborate.*

14. As noted in [1]-[11], only crimes proscribed by domestic law may be prosecuted in Australia. The *Criminal Code Act 1995* criminalises genocide, crimes against humanity, and war crimes covered by the *Rome Statute*.

15. “War crime” is defined as an offence under Subdivision D, E, F, G, or H of Division 268 of the *Criminal Code Act 1995*. These Subdivisions deal with:

20 Although it should be noted here that the UK departed from this general approach in the case of *R. v. Payne* in 2006. Corporal Payne was charged with the war crime of inhuman treatment of a protected person pursuant to the UK’s implementing legislation for the Rome Statute. Corporal Payne pleaded guilty to this charge and became the 1st British soldier to be convicted of a war crime under the UK *International Criminal Court Act 2001*. For an account of the trial see Gerry Simpson, *The Death of Baha Moussa*, 8 MELBOURNE J. OF INT’L L. 340 (2007).

- War crimes that are grave breaches of the *Geneva Conventions* and of *Additional Protocol I* (Subdivision D);
- Other serious war crimes that are committed in the course of an international armed conflict (Subdivision E);
- War crimes that are serious violations of art 3 common to the *Geneva Conventions* and are committed in the course of an armed conflict that is not an international armed conflict (Subdivision F);
- War crimes that are other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict (Subdivision G); and
- War crimes that are grave breaches of *Additional Protocol I* (Subdivision H).

The *War Crimes Act 1945* (which only applies to the period Sep. 1, 1939 to May 8, 1945) defines “war crime” differently, as one of a list of “serious crimes” (murder, rape and so forth) committed in Europe in particular circumstances (including in the course of hostilities in a war, in the course of an occupation, in the course of political, racial or religious persecution).²¹ Further prosecutions under this legislation appear unlikely.

D. *What acts fall within any such legislation or case law?*

16. The offences constituting “war crimes” under Division 268 of the Criminal Code Act 1995 are:

- In Subdivision D (war crimes that are grave breaches of the Geneva Conventions and of Additional Protocol I): wilful

²¹ *War Crimes Act 1945*, art. 6-8.

killing; torture; inhumane treatment; biological experiments; wilfully causing great suffering; destruction and appropriation of property; compelling service in hostile forces; denying a fair trial; unlawful deportation or transfer; unlawful confinement; and taking hostages;

- In Subdivision E (other serious war crimes that are committed in the course of an international armed conflict): attacking civilians; attacking civilian objects; attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission; excessive incidental death; injury or damage; attacking undefended places; killing or injuring a person who is hors de combat; improper use of a flag of truce; improper use of a flag; insignia or uniform of the adverse party; improper use of a flag, insignia or uniform of the United Nations; improper use of the distinctive emblems of the Geneva Conventions; transfer of population; attacking protected objects; mutilation; medical or scientific experiments; treacherously killing or injuring; denying quarter; destroying or seizing the enemy's property; depriving nationals of the adverse power of rights or actions; compelling participation in military operations; pillaging; employing poison or poisoned weapons; employing prohibited gases, liquids, materials or devices; employing prohibited bullets; outrages upon personal dignity; rape; sexual slavery; enforced prostitution; forced pregnancy; enforced sterilisation; sexual violence; using protected persons as shields; attacking persons or objects using the distinctive emblems of the Geneva Conventions; starvation as a method of warfare; and using, conscripting or enlisting children;
- In Subdivision F (war crimes that are serious violations of art 3 common to the Geneva Conventions and are committed in the course of an armed conflict that is not an international

armed conflict): murder; mutilation; cruel treatment; torture; outrages upon personal dignity; taking hostages and sentencing or execution without due process;

- In Subdivision G (war crimes that are other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict): attacking civilians; attacking persons or objects using the distinctive emblems of the Geneva Conventions; attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission; attacking protected objects; pillaging; rape; sexual slavery; enforced prostitution; forced pregnancy; enforced sterilisation; sexual violence; using, conscripting or enlisting children; displacing civilians; treacherously killing or injuring; denying quarter; mutilation; medical or scientific experiments; and destroying or seizing an adversary's property;
- In Subdivision H (war crimes that are grave breaches of Additional Protocol I): subjection to medical procedures; removal of blood, tissue or organs for transplantation; attack against works or installations containing dangerous forces resulting in excessive loss of life or injury to civilians; attacking undefended places or demilitarised zones; unjustifiable delay in the repatriation of prisoners of war or civilians; apartheid; and attacking protected objects.

E. *How are breaches of LOAC dealt with when they do not amount to war crimes?*

17. As there has been no armed conflict on Australia's physical territory since Japanese attacks during WWII, any breaches of LOAC are likely to be committed overseas.

Breaches of LOAC by those subject to the *DFDA* (see [58] below) that do not amount to war crimes as set out in Division 268 of the *Criminal Code Act 1995* may still constitute offences against the generally applicable criminal law, which applies extra-territorially under s 61 of the *DFDA* (see [30] below). They may also constitute one or more of the disciplinary offences set out in the *DFDA* without a counterpart in the generally applicable criminal law, such as prejudicial conduct for example.²²

18. Where there are allegations of breaches of LOAC by individuals not subject to the *DFDA*²³ which do not amount to war crimes as set out in Division 268 of the *Criminal Code Act 1995*, there is no relevant Australian crime with which they can be charged. With the exception of specific offences, such as those contained in Division 268, and some others that are not relevant to LOAC, the generally applicable criminal law does not apply outside Australia.

F. *Is your country party to the International Criminal Court statute? If so, how does that influence the national system of investigation and prosecution regarding alleged LOAC violations?*

19. Australia is a party to the *Rome Statute*. Ratification of the *Rome Statute* provided an important catalyst to revolutionise Australian national implementation of international criminal law. Ratification does not appear to have had any particular impact on processes of investigation of allegations involving members of the ADF but, as mentioned, there have been few such allegations.

20. Prior to Australian ratification of the *Rome Statute*, Australia's national implementation of international criminal law was patchy at

²² *DFDA*, *supra* note 3, art. 60.

²³ Such as Australian nationals who have returned to Australia from an overseas conflict situation or non-Australian nationals who are resident or otherwise present in Australia and have come from an overseas conflict situation.

best. There was no crime of genocide;²⁴ torture and hostage-taking were criminalised as *ad hoc* examples of crimes against humanity but there was no general category of crimes against humanity; only grave breaches of the *Geneva Conventions* and of *Additional Protocol I* in the context of an international armed conflict existed as war crimes; there were no war crimes in non-international armed conflict at all and no other serious violations of LOAC in an international armed conflict to supplement the grave breaches regimes.

21. A motivation for new, comprehensive legislation covering all offences under the *Rome Statute* was to ensure that Australia could always benefit from the complementarity formula in the future by choosing to exercise its right of primary national jurisdiction if that was its preference. Australia did not want to be in a situation of potential “genuine inability” to exercise the right of national jurisdiction for want of effective, comprehensive, criminal legislation applicable extra-territorially.

Australia made a declaration upon ratification of the *Rome Statute*. The declaration states that:

The Government of Australia, having considered the Statute, now hereby ratifies the same, for and on behalf of Australia, with the following declaration, the terms of which have full effect in Australian law, and which is not a reservation:

Australia notes that a case will be inadmissible before the International Criminal Court (the Court) where it is being investigated or prosecuted by a State. Australia reaffirms the primacy of its criminal jurisdiction in relation to crimes within

24 Australia was among the first states to ratify the *Genocide Convention*. Genocidal intent was picked up as a relevant factor rendering a ‘serious crime’ a ‘war crime’ under the *War Crimes Act 1945* (see response [15] above). However, legislation was never passed to introduce into domestic law a crime of genocide. The question of whether the existence of the crime as a matter of customary international law was sufficient in order to enable prosecution in Australian courts arose in connection with a case concerning Government policy on the treatment of indigenous peoples’ land rights. A majority of the Full Federal Court held that there was no crime of genocide in Australian law: *Nulyarimma v Thompson* (1999) 96 FCR 153; [1999] FCA 1192.

the jurisdiction of the Court. To enable Australia to exercise its jurisdiction effectively, and fully adhering to its obligations under the Statute of the Court, no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes. For this purpose, the procedure under Australian law implementing the Statute of the Court provides that no person can be surrendered to the Court unless the Australian Attorney-General issues a certificate allowing surrender. Australian law also provides that no person can be arrested pursuant to an arrest warrant issued by the Court without a certificate from the Attorney-General.

Australia further declares its understanding that the offences in Articles 6, 7 and 8 will be interpreted and applied in a way that accords with the way they are implemented in Australian domestic law.

The precise legal status of such a declaration is unclear, and the declaration is unlikely to have any practical effect. In any event much of the declaration merely confirms the position under the *Rome Statute*, or adds detail on procedural steps to be taken within Australia. Given that the *Criminal Code Act 1995* now largely reproduces the offences set out in arts 6, 7 and 8 of the *Rome Statute*, and that Australian courts, if called upon to try these offences, are likely to apply relevant domestic provisions in a manner which accords with international law, the final sentence of the declaration also does not appear to create a significant risk of divergence from international legal obligations.²⁵

G. *Does your country treat human rights law as applicable in armed conflict? If so, on what basis and to what extent?*

22. Australia is party to all the major global human rights law treaties

²⁵ Gillian Triggs, *Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law*, 25 SYDNEY L. REV. 507, 514 (2003) (hereinafter: *Triggs, A Quiet Revolution*).

and consistently claims that it takes its international human rights law obligations seriously. There is no official or formal statement of Australia's national position on the application of international human rights law in armed conflict (or in deployment situations which do not constitute armed conflict - peace missions, for example). However, the political rhetoric is constantly to the effect that Australia's Rules of Engagement (ROE) (all of which are classified and not publicly available) are written consistently with our international legal obligations (LOAC and International Human Rights Law) and that ADF members are entitled to assume that if they act consistently with their ROE they will have acted lawfully.

H. *Is your country subject to national or regional human rights tribunals or other fora which could investigate alleged LOAC violations (e.g. European Court of Human Rights)? If so, please briefly describe any key cases in that regard.*

23. Australia has ratified most major human rights treaties and some associated complaints mechanisms, such as the *First Optional Protocol to the International Covenant on Civil and Political Rights* (ICCPR), enabling the Human Rights Committee to consider individual and group complaints. There have not, to date, been any complaints that relate to alleged LOAC violations by ADF members. However, given the Human Rights Committee's stated view that ICCPR obligations apply extra-territorially to areas under the effective control of a State Party, including in the contexts of armed conflict and peace operations,²⁶ the possibility of future complaints to the Human Rights Committee of alleged Australian LOAC violations cannot be discounted.

24. There is no regional (Asian and/or Pacific) multilateral human rights treaty and so Australia is not a party to any instrument akin to

²⁶ See the Human Rights Committee's General Comments No. 29 (UN Doc. CCPR/C/21/Rev.1/Add.11, Aug. 31, 2001) and 31 (CCPR/C/21/Rev.1/Add. 13, May 26, 2004).

the European Convention on Human Rights. The UK military's experience of regular European Court of Human Rights litigation reviewing military operations or the military justice system, for example, is not shared by the ADF.

25. Australia has no specific national human rights tribunal and also no constitutional or legislative Bill of Rights. Those human rights obligations which have been implemented into legislation are reviewed by the general civilian court system. However, Australia's approach to the enactment of legislation to implement its obligations under International Human Rights Law treaties into domestic law is also patchy at best. One consequence of an *ad hoc* approach to treaty implementation is that, in the absence of legislation to implement treaty obligations, the treaties themselves do not create enforceable rights and obligations under Australian law. So, for example, while Australia has legislation prohibiting racial discrimination,²⁷ there is no legislation to implement either the UN Convention on the Rights of the Child or the ICCPR. It is possible then for Australian decision-makers to overlook, or to act inconsistently with, for example, the treaty obligation to take the best interests of children into account or the right to privacy. It is not open to Australian civilian courts to enforce treaty obligations which have not become part of Australian law through implementing legislation.

In the specific context of military operations, it is inconceivable that an Australian court could find the ADF in violation of an Australian soldier's right to life in the same circumstances as the UK Court of Criminal Appeal found against the British Government in *R (Smith) v Oxfordshire Assistant Deputy Coroner* for example. Smith was a British soldier who died from heatstroke because of inadequate water during a military patrol in an armoured personnel carrier in Iraq.²⁸ His family argued that the UK

27 The *Racial Discrimination Act 1975* implemented Australia's obligations under the 1965 Convention on the Elimination of All Forms of Racial Discrimination.

28 See *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2009] EWCA Civ 441. The UK Ministry of Defence successfully appealed this decision and the UK Supreme Court rules that the European Convention on Human rights applied to UK military members while they were on UK military

Human Rights Act applied to UK military members abroad and that the Army had violated Smith's right to life. Australia has no such legislation and there is no basis in Australian law for any such litigation.

26. That is not to say, however, that Australia's International Human Rights Law obligations have no application in the context of military operations either in armed conflict situations or on peace missions. The issue here is that there are very few crimes in Australian domestic criminal law that specifically reflect human rights law. One exception is the crime of torture implementing Australia's treaty obligations pursuant to the 1984 Convention Against Torture. But for many other specific human rights law violations, criminal accountability will only arise from violations either of general service offences in the *DFDA* or of general domestic criminal offences.

I. *What other possibilities are there for investigating possible LOAC violations (e.g. public inquiries, parliamentary hearings, special prosecutors)?*

27. The Australian Government may initiate public inquiries of various kinds to inquire into whatever matters it sees fit. Major public inquiries may take the form of "Royal Commissions" under the *Royal Commissions Act 1902*. Royal Commissions are established by the Governor-General and have extensive powers to summon witnesses and take evidence. Although there have been Royal Commissions into Australia's intelligence services, there have not been any touching on LOAC issues. Other forms of *ad hoc*, non-statutory public inquiries are also widely used, although they do not have the same coercive information-gathering powers.

28. Parliamentary committees may also undertake LOAC and other

bases abroad but that while they were engaged in military operations those conventions rights were suspended. See *R (on the application of Smith) (FC) v. Secretary of State for Defence* [2010] UKSC 29.

related inquiries. Although there was no suggestion that Australian personnel were directly implicated in abuse of detainees in Iraq, for example, the Senate referred specific questions to the Foreign Affairs, Defence and Trade Committee in 2005, including questions about whether Australian personnel had been present during the interrogation of detainees, particularly in relation to weapons of mass destruction; whether knowledge or concerns about treatment of detainees was reported by Australian personnel to Australian government agencies; and what action followed such reports. The Committee did not have access to all relevant evidence. However, it found that, among other things, there had been confusion about the fact that (according to the relevant Concept of Operations) no Australian personnel were meant to be involved in interrogations at all. The Committee also found that reporting and communication processes with the Department of Defence were inadequate in some respects.²⁹

Recent media reports have focussed on the role of an Australian Army Legal Officer who was posted with US military forces in Iraq in late 2003/early 2004. Major George O’Kane was ordered by his US commanding officer to prepare a response to an International Committee of the Red Cross (ICRC) Report critical of US handling of detainees in Abu Ghraib. Although there is no suggestion that Major O’Kane personally witnessed any prisoner abuse, he allegedly argued that the *Geneva Conventions* did not apply to at least some detainees in US custody and was instrumental in preventing ICRC access to nine detainees in cellblock 1A - the block where the most disturbing photographs were taken in late 2003. Apparently Major O’Kane told the ICRC that they were precluded

29 Senate Foreign Affairs, Defence and Trade Committees, *Duties of Australian Personnel in Iraq* (Aug. 18, 2005), [2.29], [3.62]-[3.68] (available at: www.aph.gov.au/Senate/committee/fadt_ctte/completed_inquiries/2004-07/iraq/report/index.htm). This issue has recently resurfaced in the press following the release of further documents in response to freedom of information requests by the Public Interest Advocacy Centre: see, eg, Anne Davies, Deborah Snow, Debra Jopson, *ADF knew of abuses at Abu Ghraib*, SYDNEY MORNING HERALD (Jul. 5, 2011) (available at: www.smh.com.au/national/adf-knew-of-abuses-at-abu-ghraib-20110704-1gz95.html).

from visiting the detainees on grounds of imperative military necessity.³⁰

Major O'Kane has never been charged with any offences in relation to his alleged legal advice but there have been calls for an official Australian Government Inquiry to determine the full extent of Australian involvement in the Abu Ghraib detainee abuse scandal.

29. The Department of Defence or the ADF may initiate various *ad hoc* internal inquiries. Additionally, the Inspector-General of the ADF may initiate an investigation on request or on his or her own motion. More detail about the office of the Inspector-General is given at [66]. The Inspector-General conducted an inquiry into the investigation of allegations of unlawful killing involving Special Air Services forces in East Timor, and was highly critical of the investigative process (although apparently not from the perspective that the investigation had been too cursory rather, it had been too prolonged, and much of the material collected had been unsubstantiated, emotive or otherwise inadmissible).³¹

J. *What is the basis for criminal jurisdiction over breaches of LOAC in your country (territoriality, nationality, passive personality, protective)?*

30. The jurisdictional basis of criminal jurisdiction over LOAC offences is not confined to any one basis. As noted in [4] above, Division 268 of the *Criminal Code Act*, setting out offences of genocide, crimes against humanity and war crimes, has extraterritorial application.

Although the presumption is that the bulk of Australian criminal law only applies to acts committed on the physical territory of Australia, Australian criminal law applies extra-territorially to the acts of all members

30 See *Australia's Ties to Abu Ghraib*, AUSTRALIAN BROADCASTING CORPORATION (Jul. 4, 2011), available at: www.abc.net.au/7.30/content/2011/s3260829.htm.

31 The report of the Inspector-General is confidential, but key findings are discussed in the *Senate Committee report*, *supra* note 8, at chapter 3 [3.27]-[3.52].

of the ADF, and selected civilians affiliated with the ADF (see [58] below) on deployment outside the country on the basis of s 61 of the *DFDA*. Under this provision, a “defence member” or a “defence civilian” is guilty of an offence under the *DFDA* (a “service offence”) if they commit an offence which, if committed in the Jervis Bay Territory (a small area of the eastern seaboard belonging to the Commonwealth rather than the surrounding State of New South Wales), would be an offence against the law applying there: that is, Commonwealth law (including Division 268 of the *Criminal Code Act 1995*) and the law of the Australian Capital Territory³² (including a body of basic criminal law similar to that applicable in every State). A person who has committed an offence by virtue of s 61 of the *DFDA* is liable to the punishment or maximum punishment fixed for the relevant offence under Commonwealth or ACT law.³³

Conduct committed by defence members and defence civilians outside Australia may also be subject to the criminal law of the host State. However, in such cases, potential conflicts of jurisdiction between the host State and the Australian military justice system are usually resolved by either visiting forces legislation in that country, or a bilateral status of forces agreement.³⁴

K. *Does the national war crimes legislation jurisdiction extend to members of the military? If so, under what circumstances?*

31. As noted in [4] above, the whole of the generally applicable criminal law applies to the military within and outside Australia. The national war crimes legislation (in the form of Division 268 of the *Criminal Code Act 1995*) is part of the generally applicable criminal law and, in any event, has extraterritorial application for all individuals on its own terms, whether they are members of the military or not.

32 *Jervis Bay Territory Acceptance Act 1915*, art. 4A.

33 *DFDA*, *supra* note 3, art. 61.

34 Director of Military Prosecutions Directive 02/2009: Prosecution and Disclosure Policy (Oct. 1, 2009), [30] (available at: www.defence.gov.au/legal/pdf/ddcs/dmp-2-2009.pdf).

L. *Is there universal jurisdiction and how is such jurisdiction exercised?*

32. All the offences covered by art 8 of the *Rome Statute* and reflected in Division 268 have been implemented into Australian domestic criminal law on the basis of universal jurisdiction. Australian courts also have universal jurisdiction over grave breaches of the *Geneva Conventions* in international armed conflicts pursuant to the *Geneva Conventions Act 1957* and over grave breaches of *Additional Protocol I* in the amendments to the *Geneva Conventions Act 1957* following Australian ratification of *Additional Protocols I* and *II* in 1991. This was also the case for the *Crimes (Torture) Act 1986* and the *Crimes (Hostage-Taking) Act 1986* following Australian ratification of the *Convention Against Torture 1984* and the *Convention Against Hostage-Taking 1986* respectively. In each case, the Australian Government gave effect to explicit treaty obligations requiring domestic criminalisation of serious violations of the respective treaty regimes on the basis of universal jurisdiction. To date, no criminal charges have been laid pursuant to any of these legislative enactments.

The one utilisation of universal jurisdiction in Australia arose pursuant to the 1987 amendments to the *War Crimes Act 1945* allowing for prosecution of alleged war crimes occurring in Europe between 1939 and 1945. The objective of the amending legislation was to facilitate prosecution of alleged former Nazis who had come to live in Australia in the post-WWII era. None of the suspects were Australian nationals at the time of their alleged acts, the acts were committed outside Australia and none of the victims were Australian nationals. The only “connection” to Australia was that the accused were now living here. Trial proceedings were initiated against three individual accused Ivan Polyukhovich, Heinrich Wagner and Mikael Berezowsky. All three cases collapsed for different health-related or evidentiary reasons. Importantly, however, the High Court of Australia upheld the constitutional validity of the legislation - including the universal basis of jurisdiction - by majority decision.³⁵

35 *Polyukhovich v Commonwealth* (1991) 172 CLR 501; [1991] HCA 32.

In relation to the initiation of a prosecution under Division 268 of the *Criminal Code Act 1995*, the Australian Government has guarded against unrestricted utilisation of universal jurisdiction by requiring the consent of the Commonwealth Attorney-General for any prosecution to proceed.³⁶ A decision of the Attorney-General to grant or withhold consent is final (insofar as this is compatible with the constitutionally protected original jurisdiction of the High Court of Australia).³⁷

M. *Does your country deal with the issue of “command responsibility”? If so, how?*

33. Provisions almost identical to art 28 of the *Rome Statute* but with some minor variations, such as including recklessness as to the commission of offences as a relevant mental state for commanders, have been inserted into the *Criminal Code Act 1995* as part of the International Criminal Court implementing legislation.³⁸

N. *Does your country deal with the “defense of superior orders”? If so, how?*

34. Consistently with art 33 of the *Rome Statute* there is now a limited defence of obedience of superior orders potentially available under the *Criminal Code Act 1995* in respect of war crimes (never in relation to alleged genocide or crimes against humanity).

The relevant provision states:

It is a defence to a war crime that:

(a) the war crime was committed by a person pursuant to an or-

³⁶ *Criminal Code Act 1995*, art. 268.121(1).

³⁷ *Id.*, art. 268.122.

³⁸ *Id.*, art. 268.115.

der of a Government or of a superior, whether military or civilian; and

- (b) the person was under a legal obligation to obey the order; and
- (c) the person did not know that the order was unlawful; and
- (d) the order was not manifestly unlawful.³⁹

This defence is specific and narrowly prescribed. The accused has the onus of establishing the four requisite elements of the defence on the balance of probabilities.

Interestingly, this provision, based on the *Rome Statute*, gives greater scope for a defence of superior orders than was the case under the *War Crimes Act 1945*.⁴⁰

39 *Id.*, art. 268.116(3).

40 Under the *War Crimes Act 1945*, the fact that, in doing an act alleged to be an offence, a person acted under orders of his or her government or of a superior, was not a defence, although it could be taken into account in sentencing: *War Crimes Act 1945*, art. 17; *Triggs, A Quiet Revolution*, *supra* note 25, at 530, comments that “As a matter of principle... it seems to be a retrograde step to permit the defence of superior orders under Australian law other than as a relevant consideration on sentencing”.

THE CIVILIAN JUSTICE SYSTEM

A. *What is the structure of the civilian system of justice and the role of civilian courts, the attorney general or an equivalent prosecution authority and the civilian police in general, and specifically regarding the investigation and prosecution of alleged LOAC violations?*

35. Any allegation of a violation of LOAC by an individual not subject to the *DFDA* would first be investigated by the Australian Federal Police (AFP).

The AFP is charged with provision of police services relating to Commonwealth law and Commonwealth property, and safeguarding Commonwealth interests. The AFP is under the general administration and control of a Commissioner and one or more Deputy Commissioners, appointed by the Governor-General for a fixed period but eligible for reappointment.⁴¹ The Commissioner reports to the Minister for Home Affairs and the Minister may, having obtained and considered the advice of the Commissioner and the Secretary for Home Affairs, issue written directions to the Commissioner regarding general policies to be pursued in relation to the functions of the AFP.⁴²

While the AFP has not been involved in investigating violations of LOAC by members of the ADF, it has on several occasions been involved in the arrest of Australian citizens or residents accused of war crimes in the Balkans conflict or in WWII, pursuant to requests for extradition from other countries, and is involved in an ongoing investigation into the deaths of five journalists in East Timor in 1975, in what is alleged to be a war crime perpetrated by Indonesian special forces.

⁴¹ *Australian Federal Police Act 1979*, art. 17, 37(1).

⁴² *Id.*, art. 17, 37(2).

36. In the event that the AFP undertook an investigation and it appeared that there had been an offence against Commonwealth law, a brief of evidence would be forwarded to the Director of Public Prosecutions.

The Director of Public Prosecutions (DPP) heads the Office of the Commonwealth Director of Public Prosecutions. The DPP is appointed by the Governor-General for a fixed period not exceeding seven years, and is eligible for reappointment.⁴³ The Office falls within the portfolio of the Attorney-General, and the Attorney-General is responsible to Parliament for the criminal justice system, including prosecutions, but the DPP makes decisions independently as to whether or not to lay charges, and the relationship with the Attorney-General is subject to certain procedural provisions. Each of the DPP and the Attorney-General are required to consult, if the other requests it, regarding the exercise of his or her functions and powers.⁴⁴ The Attorney-General may, following consultation with the DPP, issue guidelines to the DPP regarding the performance of the DPP's functions and the exercise of the DPP's powers, but such directions must be in writing, published in the Gazette and tabled in Parliament.⁴⁵ In practice such directions are rarely issued.⁴⁶ However, if the DPP decided to lay charges pursuant to Division 268 of the *Criminal Code Act 1995* (incorporating offences analogous to those under arts 6, 7 and 8 of the *Rome Statute*), the consent of the Attorney General would be required.

Offences against Commonwealth criminal law will usually be tried in the State and Territory court hierarchies.

B. *If there is an attorney general or similar individual in your country, what is his or her role, in particular with regard to incidents that involve*

⁴³ *Director of Public Prosecutions Act 1983*, art. 18.

⁴⁴ *Id.*, art. 7.

⁴⁵ *Id.*, art. 8.

⁴⁶ Prosecution Policy of the Commonwealth of Australia [1.2] (available at: www.cdpp.gov.au/Publications/ProsecutionPolicy).

possible LOAC issues or possible LOAC violations? Does he/she provide advice on legal matters, supervise subordinate prosecutors, oversee investigative or police personnel? Who has the authority to determine whether or not to prosecute? Is there any other relevant authority?

37. As noted in [1]-[11], any allegations of LOAC violations by members of the ADF are likely to be investigated and tried primarily in the military justice system unless the DMP, in consultation with the DPP, is of the view that the severity of the alleged offence warrants prosecution in the civilian courts. In the event that an individual not subject to the *DFDA* was alleged to have engaged in LOAC violations, the investigation would be undertaken by the AFP and any decision to lay charges and institute criminal proceedings would be taken by the DPP, not the Attorney-General. However, the consent of the Attorney General would be required for any proceedings under Division 268 of the *Criminal Code Act 1995*.

In Australia, the Attorney-General has a more political role than may be the case in other countries.⁴⁷ The Attorney-General is an elected member of Parliament, may sit in the Cabinet, and heads a large department. While the Attorney General is the chief legal adviser to the Government, much of the advisory role, and the responsibility of representing the Commonwealth in litigation, now falls to the Solicitor-General.⁴⁸

C. Do the civilian investigative authorities, including criminal investigators, act independently or are they subject to the direction of the prosecutor or other actors in the justice system?

38. AFP investigators act independently. However, the DPP may, if he

⁴⁷ There has been some debate since the 1990s about the nature of this office, and in particular the extent to which the Attorney-General is required by convention to defend the independence of the judiciary in the face of politically inflected criticism.

⁴⁸ *Law Officers Act 1964*, art. 12; The Solicitor-General is appointed by the Governor-General for a fixed term not exceeding seven years: art. 6(1).

or she believes that a matter connected with or arising out of the offence requires further investigation, request the AFP (in writing) to investigate further, and the AFP must comply with the request insofar as it is practicable.⁴⁹

D. *What, if any, safeguards are in place (under law, regulation, policy or practice) to ensure the independence and impartiality of the various actors in the civilian justice system who might be involved in investigating or prosecuting possible LOAC violations? Is there any relevant case law?*

39. The AFP derives its authority and its independence from the *Australian Federal Police Act 1979*. Pursuant to that legislation, the AFP is the Agency tasked with responsibility for investigation of alleged Commonwealth crimes - including those that could constitute violations of LOAC. The relationship between the military and civilian justice systems has been discussed in [1]-[11]. If ADFIS or the DMP referred a military matter to the civilian authorities, the AFP would be responsible to investigate the allegations.

If an alleged violation of LOAC was perpetrated by an AFP officer on deployment, the AFP has its own investigative authority (akin to ADFIS in the military system). The AFP's Professional Standards is responsible to the Commissioner for the investigation of alleged offences by AFP members. The legislative authority for Professional Standards is articulated in Division V of the *Australian Federal Police Act 1979*. The legislation authorises the Commissioner to promulgate orders for the exercise of 'internal' investigative powers and procedures.⁵⁰ The key instrument is 'The Australian Federal Police Commissioner's Order on Professional Standards (CO2)'.⁵¹ Although there are significant numbers

49 *Director of Public Prosecutions Act 1983*, art. 13.

50 *Australian Federal Police Act 1979*, art. 40RC(1).

51 Text available at: <http://www.afp.gov.au/about-the-afp/~media/afp/pdf/ips-foi-documents/ips/publication-list/AFP%20Commissioners%20Order%20on%20Professional%20Standards%20CO2.ashx>.

of AFP officers deployed in peace missions around the world, there has never been an allegation of a serious criminal offence which could amount to a violation of LOAC and, consequently, there is no specific precedent by which to judge the independence of the AFP internal investigative process.

40. The Commonwealth DPP has the responsibility for prosecuting Commonwealth offences (including alleged violations of LOAC). The DPP has no investigative authority and so is reliant on investigative agencies for the referral of briefs of evidence within their respective fields of competence - particularly the AFP. As discussed in [36] above, in relation to alleged violations of LOAC, the DPP would receive the brief of evidence from the AFP.

The independence of the office of the DPP is guaranteed by the *Director of Public Prosecutions Act 1983* which outlines the functions and powers of the Director. The DPP's independence from Government is not absolute because the statute authorises the Commonwealth Attorney-General to give directions to the DPP in relation to matters of practice, cases generally and individual cases. However, the authority of the Attorney to direct the DPP is highly regulated and transparent. Any direction must be in writing, following mandatory discussions with the DPP and then the direction must be tabled in Parliament and also gazetted. According to the immediate past Commonwealth DPP:

In the twenty three years my office has been operating there have only been four directions and none of them have related to individual cases, they have all involved either a direction as to procedural matters to facilitate legislation or to simplify the role of the Office within the Parliamentary Committee process. They were quite uncontroversial and readily accepted by the director at the time as they were seen to be of assistance in facilitating the work of the Office.⁵²

52 See Damien Bugg QC, *The Independence of the Prosecutor and the Rule of Law* (Aug. 31, 2007); Text available at: www.cdpp.gov.au/Director/Speeches/20070831db.aspx.

The DPP has published a document entitled ‘Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process’ which, as the title suggests, articulates the factors influencing the decision to lay or not lay charges. The document explains the discretion of the DPP and the bases for the exercise of that discretion in specific situations. As with the DMP, the only basis for judicial review of a decision by the DPP to lay or to not lay charges arises pursuant to the general provision of section 75(v) of the Constitution - the writ of mandamus to compel the performance of a public duty or the exercise of a public official’s discretion according to law. No such action has ever been initiated against the DPP in response to his or her decision to lay or not to lay charges. Any exercise of the DPP’s discretion consistently with the Prosecution Policy could not be said to be exercised unlawfully.

41. The independence of civilian judges in Australian federal courts is guaranteed by Chapter III of the Constitution of Australia. Judges of Federal Courts are appointed by the Governor-General until they reach the mandatory retirement age of 70 years. Judges cannot be removed from office except by the Governor-General in response to a request from a joint sitting of both houses of Parliament on grounds of ‘proved misbehaviour or incapacity’.⁵³ The independence of the judiciary is fundamental to the Australian approach to governance and to upholding the rule of law (the notion that no one is above the law, everyone is bound by the law, everyone is equal before the law). The judiciary exists to provide justice for all and to do so free from intimidation or favour. The judges of the High Court of Australia often find against the Government and it is readily accepted by society at large, as well as by politicians themselves, that this is both desirable and an essential feature of a nation governed by law.

E. *If a matter is subject to a public inquiry and a criminal investigation how is the matter handled (criminal first/concurrent investigation, etc.)?*

⁵³ Constitution of Australia, art. 72(ii).

42. There has never been an instance of such parallel investigations on any LOAC related matter. As a general proposition, though, consideration of whether a public inquiry is appropriate (and if so, what kind) would depend in part on the likelihood of criminal proceedings being commenced, and the effect of any public inquiry on the sustainability of a prosecution.⁵⁴

F. *Are there specific laws applicable to members of civilian security services? If so, please briefly describe them.*

43. The Australian Secret Intelligence Service (ASIS) and the Australian Security and Intelligence Organization (ASIO) are both established by statute and are required to comply with statutory provisions concerning their functions and powers.⁵⁵ Mechanisms for oversight include the existence of an Inspector-General for Intelligence and Security, an office created by statute and granted powers to initiate own-motion investigations and take sworn testimony,⁵⁶ and a Parliamentary Joint Committee on Intelligence and Security (focused on administration and budgetary matters, and complementing the more legal focus of the Inspector-General for Intelligence and Security). There is no specific legislation that applies to the overseas activities of members of Australia's secret intelligence community in the same way that the *DFDA* applies extraterritorially to members of the ADF on deployment. However, Australia's general domestic criminal law with extra-territorial application certainly does apply to members of the secret intelligence community as much as it applies to all Australian citizens.

44. There were two Australian citizens incarcerated in Guantánamo

⁵⁴ In the case of a Royal Commission, individuals are not entitled to refuse to answer questions or provide information to Royal Commissions on the grounds of self-incrimination, unless they have already been charged with an offence and the offence is not yet disposed of by the courts: *Royal Commissions Act 1902*, art. 6A; Self-incriminating evidence may not be used directly in criminal proceedings, although it may be used as a basis for further criminal investigations to derive other, admissible evidence: *Royal Commissions Act 1902*, art. 6DD.

⁵⁵ *Intelligence Services Act 2001* and *Australian Security and Intelligence Organization Act 1979* respectively.

⁵⁶ *Inspector-General of Intelligence and Security Act 1983*.

Bay in connection with the US self-declared Global War on Terror. One of those was Mamdouh Habib who, some years after repatriation to Australia without trial by US military commission, instituted legal proceedings against the Commonwealth Government. Habib alleged that after his arrest in Pakistan he was tortured in that country, in Egypt and also in US custody at Bagram Airbase, at Kandahar and in Guantánamo Bay. Habib also alleged that a number of torture sessions in various locations were witnessed by Australian Government officials - ASIO, AFP and/or a representative of the Department of Foreign Affairs and Trade.⁵⁷

Habib sued the Australian Government for the tort of misfeasance in public office alleging that the Australian officials physically present while he was tortured were accomplices to the crimes of torture perpetrated against him. Pursuant to Section 6 of the Australian *Crimes (Torture) Act 1988*, Australian courts have universal jurisdiction over acts of torture - irrespective of the physical location of the act or the nationality of the perpetrator. Section 11(2) of the *Criminal Code Act 1995* renders those responsible for aiding, abetting, counseling or procuring the perpetration of Commonwealth offences also responsible for the principal offence. According to Habib, the Australian officials allegedly present during the torture sessions were legally responsible for Commonwealth offences and so each had acted beyond their lawful authority.

The Australian Government, in response to Habib's law suit, counter-claimed that the Court had no jurisdiction to hear the case because to do so would involve violation of the Act of State Doctrine as the case could only be decided with Australian adjudication of the acts of foreign government officials. The Australian Government sought to have the case dismissed at a preliminary stage. That request was rejected unanimously by a full court (three judges) of the Australian Federal Court.⁵⁸ Having

⁵⁷ For a summary of Habib's allegations, see the judgment of Justice Perram, *Mamdouh Habib v. Commonwealth of Australia* [2010] FCAFC 12 (Feb. 25, 2010), at paras. 15-19.

⁵⁸ *Id.*

lost the attempt to have the case dismissed, the Australian Government settled the case out of court by paying an undisclosed sum of money to Mamdouh Habib - presumably to avoid public airing of Habib's evidence of the physical presence of Australian Government representatives at various torture sessions.⁵⁹ Consequently, Habib has never proved his allegations but there is also no jurisprudence on the legal obligations of members of Australia's secret intelligence community in relation to alleged complicity in serious international crimes like torture (or violations of LOAC). There was never any suggestion that Australian Government officials, including members of the secret intelligence community, could not be held to account for involvement in such offences. That perhaps is one of the key legacies of Habib's litigation.

45. The Australian Federal Police has an International Deployment Group, which works internationally to support peacekeeping and to deploy AFP officers and assist with capacity-building in countries including Afghanistan, Cambodia, Cyprus, the Solomon Islands, Sudan, Timor Leste and Vanuatu. In most of those deployment situations, there is no armed conflict and so LOAC is not the applicable legal framework. In situations like Afghanistan, however, AFP personnel are deployed in a broader armed conflict context. The relatively small contingent of AFP officers in Afghanistan (approximately 12) are engaged in policing functions - either in counter-narcotics or in training of the national Afghan Police Force in routine policing work. It is unlikely that any AFP member would commit a violation of LOAC in such circumstances. However, if that were to occur as a consequence of an AFP officer taking a direct part in hostilities and engaging in the armed conflict, there is an investigative structure in place and there are certainly applicable legislative offences with which the officer could be charged and tried.

59 *Gillard says Habib deal in taxpayers interests*, ABC News (Jan. 8, 2011), available at: www.abc.net.au/news/2011-01-08/gillard-says-habib-deal-in-taxpayers-interests/189845.

THE MILITARY JUSTICE SYSTEM

A. *What breaches of LOAC fall under military law?*

46. By virtue of s 61 of the *DFDA*, an offence which, if committed in a particular Commonwealth territory, would be an offence against Commonwealth law (including Division 268 of the *Criminal Code Act 1995*) may be prosecuted as an offence under military law, and attracts the same punishment or maximum punishment as would be applicable if the offence had been committed in Australia. However, as already discussed above at [5], the MoU between the DsPP and the DMP suggests that although the DMP could bring charges under the military justice system, it is more likely that the matter would be handed over to the relevant DPP and charges laid under the civilian justice system.

Conduct that violates LOAC but falls short of constituting an offence against either Division 268 or other generally applicable criminal law might still constitute an offence under the *DFDA* (for example, as prejudicial conduct) and would be dealt with by the military justice system.

B. *What options are available under military law for the investigation of possible LOAC violations (e.g., criminal investigations, boards of inquiry, operational command or unit level investigations)?*

47. The Australian military justice system relies upon a graduated scale of investigation from routine operational reporting through various stages to a full criminal investigation. Although in many cases a range of different inquiries will follow a single incident, it is not required that these inquiries be undertaken in the order in which they are described here. In a situation in which there is a suspected violation of LOAC, for example, incident reporting procedures would lead to a criminal investigation being commenced by the ADF Investigative Service (ADFIS) or possibly even a

criminal investigation by the AFP and the civilian authorities even if a military administrative inquiry had not been initiated.

48. Incident reporting: The initial routine military procedure is the “incident report”. Members of the Australian Defence Force must report a “notifiable incident” immediately.

Notifiable incidents include:⁶⁰

- any incident that raises a reasonable suspicion that an offence has been committed against the *DFDA* (other than disciplinary incidents adjudged by the chain of command to be of a minor nature⁶¹), or against Australian or foreign criminal law involving Defence personnel, property or premises;
- the death, serious injury or disappearance of non-Defence personnel (other than enemy combatants⁶²) involving any Defence activity, property or premises, *even where there may be no reasonable suspicion of an offence*; and
- any other incident deemed by commanders or managers to be serious, sensitive or urgent, such as events that might bring Defence into disrepute, or attract media or Parliamentary attention.

60 Defence Instructions (General), DI(G) ADMIN 45-2: The reporting and management of notifiable incidents (Mar. 26, 2010) (hereinafter: *DI(G) ADMIN 45-2*) [6].

61 These are incidents that would usually be dealt with by a ‘subordinate summary authority’ (an officer delegated by the commanding officer), or by a ‘discipline officer’ (an officer empowered to deal with conduct such as negligent performance of a duty and prejudicial conduct where charges have not been laid, and the Defence member involved admits the infringement and elects to be dealt with by a discipline officer).

62 Although a Note to *DI(G) ADMIN 45-2*, *supra* note 60, [6] adds that, where there is a death, serious injury or disappearance to an enemy combatant in circumstances in which the enemy combatant is in the custody or effective control of Defence personnel, this does constitute a notifiable incident and must be reported as such.

If there is doubt as to whether a matter is a notifiable incident, it should be reported.⁶³

The determination whether an incident is notifiable must be made as soon as possible after awareness of the incident. If the determination is that there was a notifiable incident, a report must be filed immediately. The incident report must contain at least the date, time, location and nature of the incident, and details of those involved, and mention any involvement of media or civil authorities.⁶⁴

Incident reports are filed with the operational commander who sends it on to theatre command. From there the report is forwarded to the three star Commander Joint Operations (CJOPS) back in Australia. Incidents that raise a reasonable suspicion that an offence has been committed under the *DFDA*, and incidents of death, serious injury or disappearance of civilians (or of enemy combatants in the custody of Defence personnel) must also be reported to ADFIS or the service police for action, and to the service provost marshal for information.⁶⁵

In the event of a notifiable incident, commanders and managers have various responsibilities, including, after consulting with the appropriate Defence Investigative Authority (DIA) (ADFIS for serious service offences which could also constitute civilian offences and the Service Police for *DFDA* or service only offences), taking all reasonably available steps to preserve potential evidence in order to ensure that it is not lost, destroyed, or compromised; and to prevent interference with witnesses or the construction of false defences.⁶⁶ Commanders are also required to afford all

⁶³ *DI(G) ADMIN 45-2*, *supra* note 60 [7].

⁶⁴ *Id.* [13].

⁶⁵ *Id.* [14]. Paragraph 14 is entitled 'Reporting a Notifiable Incident to the Relevant Area in Defence'. The Paragraph includes a Table of different types of Notifiable Incidents with the appropriate body identified for reporting. It is clear from the Table that Service Police are only involved in investigating less serious incidents and ADFIS is the responsible body for more serious incidents.

⁶⁶ *DI(G) ADMIN 45-2*, *supra* note 60 [26].

reasonable assistance to personnel of the relevant Defence Investigative Authority.⁶⁷ Where it is necessary for mission accomplishment or the safety of personnel, access of investigators to an area may be restricted, but this is to be for the minimum period necessary.⁶⁸

When a DIA (ADFIS or the relevant service police) receives a notifiable incident report concerning reasonable suspicion of a service offence pursuant to the *DFDA*, the DIA must decide whether to attend the incident site, commence an independent investigation, or refer the matter to another party (a more appropriate DIA, the civilian authorities, the initiating authority or another area of Defence) for investigation or action.⁶⁹ If the incident has occurred in an operational area, the DIA must consult with the relevant operational commander to determine whether there are safety, security or operational issues that might impact on the commencement of an investigation.⁷⁰

When a DIA receives a notifiable incident report concerning civilian death, serious injury or disappearance that does not, in itself, raise a suspicion that an offence has occurred, ADFIS or the service police are required to respond as necessary to render immediate assistance, contact civilian police if appropriate, and ensure the securing of the incident area and preservation of evidence.⁷¹ ADFIS or the service police will also decide whether an investigation is appropriate. The response required from the chain of command will depend on the nature of the incident but commanders can also refer the incident to ADFIS if they consider it appropriate.⁷²

In any case of receipt of a notifiable incident report, a DIA is required

67 *Id.* [26].

68 *Id.* [27].

69 *Id.* [17].

70 *Id.* [18].

71 *Id.* [20]. Paragraph 20 refers to DI(G) OPS 13-15 - Incident Scene Initial Action and Preservation but that document has not been made publicly available by Defence.

72 *Id.* [21].

to report the outcome of any assessment as to what further investigations are required to the relevant commander or line manager within seven days of receipt.⁷³

49. Quick assessment: There is a “quick assessment” (QA) procedure that is distinct from, but related to, the system of incident reporting. Quick assessments may be undertaken on the initiative of a commander or supervisor, or they may be initiated following an incident report. The QA is not itself an investigation or even a precursor to an investigation; it is an administrative assessment of the incident, and a means of determining the appropriate course of action to be taken.⁷⁴ A QA must be completed within 24 hours of the direction to undertake the assessment.⁷⁵ It involves a brief statement of the facts, without formal statements, and (if the individual preparing the QA is directed to make recommendations) recommendations for future action, together with a written endorsement or decision of a commander in response.⁷⁶ The officer undertaking the QA would usually speak to the personnel involved in the incident to understand what occurred, and the relevant context. The reporting lines for the quick assessment are the same as for the incident report.

Any member of the ADF may be directed to conduct a QA, but objectivity and impartiality is necessary, so individuals in the chain of command or line management of the person(s) involved in the incident may only be selected to undertake the QA if they have no involvement or personal interest in the matter.⁷⁷

The QA may be conducted when other inquiries are occurring,

⁷³ *Id.* [31].

⁷⁴ Defence Instructions (General), DI(G) ADMIN 67-2: Quick Assessment (Aug. 7, 2007) (hereinafter: *DI(G) ADMIN 67-2*) [2].

⁷⁵ *Id.* [11].

⁷⁶ *Id.* [3].

⁷⁷ *Id.* [9]-[10].

but must not interfere with such other inquiries or investigations.⁷⁸ If, in the course of a QA, it becomes evident that a notifiable incident may have occurred, this must be reported to the commander or supervisor immediately and reported accordingly (see [48] above). The QA must still be completed but the individual undertaking the QA is required to liaise with investigators from ADFIS to ensure that he or she does not interfere with investigations.⁷⁹

50. Administrative inquiries: Under the incident reporting regime, suspected violations of LOAC will have been reported to both command and to ADFIS promptly, and it will be open to ADFIS to commence an investigation immediately. In relation to incidents in which there is no suspicion of an offence, a range of possible administrative inquiries are open. The commanding officer in theatre can institute a routine inquiry for a less serious incident involving relatively few people. For more serious incidents, there is a graduated scale of inquiries requiring escalating levels of authorisation - CJOPS, CDF and, in the case of an ADF Court of Inquiry, the Minister of Defence. The more serious administrative inquiries authorised external to the theatre of operations are all conducted under the authority of the *Defence Act 1903* and in accordance with procedures detailed in *Defence (Inquiry) Regulations 1985*:

- Minister of Defence General Court of Inquiry (can be established in response to a major incident such as an accident involving multiple ADF deaths or very senior ADF officers);
- Chief of the Defence Force (CDF) Commissions of Inquiry (used primarily to investigate the deaths of ADF members);
- Boards of Inquiry (now superseded by Commissions of Inquiry)

⁷⁸ *Id.* [13].

⁷⁹ *Id.* [17].

as a means of investigating the deaths of ADF members, but still used to inquire into incidents such as accidents or injury to ADF personnel, or damage to property and assets of the Department of Defence); and

- Inquiry Officer inquiries (used to inquire into any matter concerning Defence that is under the command or control of the appointing officer).⁸⁰

Defence Instruction (General) Admin 67-02 entitled 'Quick Assessment' includes a detailed Annex on 'Guidance on Selecting the Most Appropriate Type of Administrative Inquiry'.⁸¹ An administrative inquiry into civilian death or injury (in the absence of a reasonable suspicion of a LOAC violation) would usually either be conducted by a routine inquiry or by an Inquiry Officer.

An inquiry by an Inquiry Officer involves the drafting of terms of reference and the appointment of an Officer (usually an ADF Officer) and supporting staff either by the commanding officer in the theatre of operations or by CJOPS in Australia. The inquiry team is deployed to the theatre of operations and is based there for the duration of the inquiry. The Inquiry Officer interviews all key participants in relation to any incident and prepares a draft inquiry report explaining what the Inquiry Officer believes happened during the incident, the context in which the incident occurred and any recommendations for subsequent action. The draft is distributed to key participants who are provided an opportunity to comment on the Inquiry Officer's proposed recommendations. The Inquiry Officer then finalises the report and files it with CJOPS.

Inquiry Officer inquiries are generally conducted in private, without

80 See Department of Defence, *What Kind of Administrative Inquiries Does the ADF Conduct?*, available at: www.defence.gov.au/coi/appointed.htm.

81 See Annex C, *DI(G) ADMIN 67-2*, *supra* note 74.

formal hearings (whereas CDF Commissions of Inquiry and Boards of Inquiry are usually public).⁸² However, some reports of inquiries have been posted on the Department of Defence website (with redactions): see [87] below.

If an administrative inquiry raises the possibility of LOAC violations despite the earlier incident report and subsequent quick assessment raising no such suspicion, ADFIS must be notified immediately and it will be for ADFIS to determine whether or not to conduct a criminal investigation. Defence Instruction (General) Admin 67-02 entitled 'Quick Assessment' also includes a useful 'Quick Assessment Flow Diagram' which demonstrates the process by which an Administrative Inquiry can follow on from a Quick Assessment. The Flow Diagram clearly shows that an investigation can be initiated at any stage in the process and that an investigation takes precedence over the routine administrative processes.⁸³

51. Criminal investigation: If a criminal investigation is opened, ADFIS deploys its own investigators to the theatre of operations, interviews participants in the incident and gathers evidence in order to produce a brief of evidence for the DMP. At the conclusion of the investigation a copy of the brief of evidence is provided to the commanding officer as well as to the Provost-Marshal, together with details of the action taken (such as referral to the DMP).⁸⁴ On the basis of that brief of evidence, DMP decides on any next course of action - further specific inquiries by ADFIS, the laying of charges and/or referral to a civilian prosecuting authority to consider the initiation of criminal proceedings. The DMP too is required to keep commanding officers informed of progress on the matter.⁸⁵

In conducting criminal investigations, ADFIS is required to

82 *Id.*, Annex C.

83 *Id.*, Annex A.

84 *DI(G) ADMIN 45-2*, *supra* note 60 [31].

85 *Id.* [32].

investigate independently, free of influence from the chain or line management, but any investigation will require close consultation between commanders or managers and ADFIS.⁸⁶ Only the Provost Marshal of ADFIS (and the heads of other DIAs, such as the provost marshals of the service police) have the authority to suspend or cease an investigation. The Chief of the Defence Force (CDF), Commander Joint Operations (CJOPS), Vice Chief of the Defence Force (VCDF) and the service chiefs (CN, CA, CAF) may request that an investigation be suspended, but such requests must be in writing and recorded in the Defence Policing and Security Management System (a database holding all notifiable incident reports and investigation reports). A decision to suspend or cease the investigation, and reasons for the decision, must likewise be recorded in DPSMS.⁸⁷

ADFIS is an independent organisation, headed by a Provost Marshal who is appointed for a fixed term by, and reports to, the Chief of the Defence Force. ADFIS is thus responsible to the Chief of the Defence Force, and is separate and independent to the immediate chain of command of the ADF. Because the Head of ADFIS reports to the CDF, it is possible that an ADFIS decision to investigate could be overruled by the chain of command at the highest level. Although this possibility exists, the current position in relation to potential chain of command influence is an improvement on the previous situation. When ADFIS was first created in 2006 the decision was taken then to have the Provost Marshal report directly to CDF to avoid the identified concern of chain of command influence over Service Police investigations.⁸⁸

Following an ADFIS investigation, the decision whether or not to lay charges is for the DMP. The DMP operates outside the chain of command

⁸⁶ *Id.* [28].

⁸⁷ *Id.* [33], [35], [36].

⁸⁸ See recommendations on 'ADFIS Command and Control' in Report of an Audit of the Australian Defence Force investigative Capacity, July 2006, paras 7.31-7.33, 63, *available at*: www.defence.gov.au/publications/spauditreport.pdf.

and answers to the Minister of Defence pursuant to Part XIA (S. 188 - 188GR) of the DFDA. Any decision of the DMP to lay or to not lay charges is only judicially reviewable by the High Court of Australia pursuant to the general provision of section 75(v) of the Constitution - the writ of mandamus to compel the performance of a public duty or the exercise of a public official's discretion according to law. No such action has ever been initiated against the DMP in response to her decision to lay or not to lay charges.

52. A recent case provides an example of a situation in which a QA, an administrative inquiry and a criminal investigation were all utilised. Five Afghan civilians were killed during a night raid on a compound in Oruzgan when soldiers posted two grenades into a room from which they were drawing automatic fire. An incident report and a quick assessment were filed and it was determined that an administrative inquiry was required. An Inquiry Officer and support staff were sent from Australia to Afghanistan. The Inquiry Officer's report raised suspicions of unlawful action and recommended investigation. ADFIS received the Inquiry Officer's report and initiated an investigation. ADFIS completed a brief of evidence and transferred it to the DMP, who subsequently requested ADFIS to undertake further investigation and clarification. The investigations culminated in charges, but these were not charges of breaches of LOAC. Instead, the central charges were for manslaughter by criminal negligence. However, the Chief Judge Advocate, presiding over the court martial, upheld preliminary objections to the charges on the basis that negligence was an inappropriate basis for criminal liability in the context of military operations - there being no legally enforceable duty of care in that context. Following the dismissal of charges, the DMP announced that no new charges would be laid and proceedings against the two accused were terminated.

C. *Can civilians be the subject of such investigations?*

53. Civilians may be involved in the investigations detailed in [47]-[51] above as witnesses, but would not usually be the subject of such investigations. There is provision under the DFDA for civilians who accompany the ADF on deployment overseas (in some contractual capacity) to agree in writing to subject themselves to the military justice system. Any such designated ‘defence civilians’ certainly could be the subject of criminal investigation and prosecution in the same manner as ADF members.

D. *Provide a general description of the structure of the military justice system and the role of military courts, prosecution authority (including any military AG/JAG or similar authority) and military police regarding the investigation and prosecution of breaches of LOAC?*

54. The military justice system has two components: an administrative component (including procedures for the imposition of adverse administrative action, such as penalties of formal warnings, censures, removal from command, and discharge from the service) and a disciplinary component (for offences under the *DFDA*).

Both disciplinary and administrative action may be initiated against an ADF member arising from the same incident and it is not unusual for such to occur. For example, an ADF member convicted of a service or criminal offence may be required to show cause why they ought not also be subject to adverse administrative action.

The following discussion focuses on the disciplinary component of the military justice system.

55. Punishment and prosecution: “Disciplinary infringements” (minor offences such as absence from duty, disobeying a lawful command, and

prejudicial conduct) by individuals below a certain rank may be dealt with by a “discipline officer” appointed to undertake this role by a commanding officer, but only in circumstances where charges have not been laid in respect of the relevant conduct, and where the individual concerned elects to be dealt with by a discipline officer (admitting that he or she committed the infringement).⁸⁹ Discipline officers may impose a range of minor punishments, but they do not constitute “service tribunals”.⁹⁰ If a discipline officer takes the view that the disciplinary infringement is too minor to be dealt with under the statutory provisions applying to discipline officers, he or she may decline to deal with the infringement.⁹¹ All the conduct constituting “disciplinary infringements” may also be dealt with, as appropriate, by more formal disciplinary processes.⁹²

Other than in the limited circumstances in which a discipline officer can act, charges will be laid and offences will be tried before a “service tribunal”. Either the DMP, a commanding officer or an ADF member authorised in writing by a commanding officer,⁹³ may lay charges of service offences against an ADF Member (or against a defence civilian). The decision whether or not to lay charges is discretionary.

There are three kinds of “service tribunal”: a summary authority, a Defence Force magistrate, and a court martial.

Summary authorities are officers within the chain of command empowered to deal with certain offences. Summary authorities comprise superior summary authorities (appointed as individuals, or as a class of officers, by the Chief of the Defence Force or a service chief⁹⁴), commanding

89 *DFDA*, *supra* note 3, art. 169A, 169C, 169E(2).

90 *Id.*, art. 169F(4).

91 *Id.*, art. 169F(3).

92 *Id.*, art. 169J.

93 *Id.*, art. 87(1).

94 *Id.*, art. 105.

officers, and subordinate summary authorities (appointed by commanding officers⁹⁵). The jurisdiction of summary authorities to try charges is limited according to, among other things, the rank of the accused. None of the classes of summary authority may try “prescribed offences”, which include offences such as murder and most other offences against the generally applicable criminal law for which a person is liable to more than two years imprisonment.⁹⁶ If an individual is charged with a service offence, and the service offence has not yet been dealt with by a summary authority, the commanding officer of the accused, or a superior officer, may refer the charges to the DMP.⁹⁷

Defence Force magistrates and courts martial deal with the more serious offences. The DMP is responsible for prosecuting these offences (for more on the DMP, see [61] below). The Judge Advocate General plays a role in appointing Defence Force magistrates and judge advocates but is not involved in prosecution (for more on the Judge Advocate General, see [60] below).

There are two types of court martial: general and restricted. A general court martial comprises a president (of the rank of colonel or higher) and at least four other members. A restricted court martial comprises a president (of the rank of lieutenant colonel or higher), and at least two other members.⁹⁸ In both cases, a judge advocate conducts proceedings before a panel of general ADF officers (ie, not legal officers). A judge advocate is selected from among the members of the Judge Advocates’ Panel - a group of legal officers appointed by the CDF on the advice of the JAG for fixed terms of no more than three years (although renewed appointments are possible).⁹⁹ The judge advocate explains the law and the panel members

95 *Id.*, art. 108.

96 *Id.*, art. 104; Defence Force Discipline Regulations, art. 44.

97 *DFDA*, *supra* note 3, art. 105A; There are also a range of other circumstances in which charges may be referred to the DMP, even after the start of proceedings before a summary authority: see *DFDA*, *supra* note 3, art. 103.

98 *Id.*, art. 114, 116(2).

99 *Id.*, art. 196.

are required to determine the case by applying the law to the facts as they find them to be. In courts martial proceedings, the judge advocate plays a similar role with equivalent decision-making powers as a judge in a civil trial by jury. Paragraph 1 of Section 134 of the DFDA entitled ‘Powers of Judge Advocate’, for example, specifies that:

In proceedings before a court martial, the judge advocate shall give any ruling, and exercise any discretion, that, in accordance with the law in force in the Jervis Bay Territory, would be given or exercised by a judge in a trial by jury.

Both types of court martial have jurisdiction to try all charges (except certain offences relating to the conduct of those already in custody), but a restricted court martial may not impose a sentence of imprisonment for a period exceeding six months, whereas a general court martial may impose a sentence of imprisonment for life if other conditions are fulfilled.¹⁰⁰

Individuals who are judge advocates may be appointed by the Judge Advocate General as Defence Force magistrates to hear a charge.¹⁰¹ DFMs have the jurisdiction and powers of a restricted court martial,¹⁰² and, being legally trained, they sit alone.

56. Review and appeal: There is an automatic review of all convictions in service tribunals, undertaken by officers appointed (by the Chief of the Defence Force or the relevant service chief) as “reviewing authorities”.¹⁰³ A reviewing authority will only be competent to undertake the review of a proceeding if that officer did not play a role in the original charging process.¹⁰⁴ The review must take place within 30 days of the service tribunal’s record being transmitted to the reviewing authority or, if the exigencies of service

¹⁰⁰ *Id.*, at Schedule 2.

¹⁰¹ *Id.*, art. 127.

¹⁰² *Id.*, art. 129(1).

¹⁰³ *Id.*, art. 150, 152; A convicted person may also specifically petition for review: art. 153.

¹⁰⁴ *Id.*, art. 150A.

preclude this, as soon as possible thereafter.¹⁰⁵ Before undertaking the review, the reviewing authority must obtain a report on the proceedings from a legal officer, and is bound by the opinion of the legal officer on any question of law.¹⁰⁶

The Chief of the Defence Force or a service chief may also undertake a further review, if they believe there are sufficient grounds to do so, and in undertaking the further review will obtain a report by the Judge Advocate General or a Deputy Judge Advocate General.¹⁰⁷

A reviewing authority (on the report of a legal officer) may take a range of steps. In particular, he or she may quash the conviction, if it appears to him or her that the conviction is unreasonable or cannot be supported having regard to the evidence; that, as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction was wrong in law and that a substantial miscarriage of justice has occurred; that there was a material irregularity in the course of the proceedings and that a substantial miscarriage of justice has occurred; or that, in all the circumstances of the case, the conviction is unsafe or unsatisfactory.¹⁰⁸ If it appears to the reviewing authority that there is admissible evidence that was not reasonably available during the original proceeding, and is likely to be credible, the reviewing authority is required to receive and consider that evidence, and quash the conviction if it is unreasonable or cannot be supported having regard to the new evidence.¹⁰⁹ The reviewing authority may also, in certain circumstances, order a new trial or convict the accused of an alternative offence.¹¹⁰ If a conviction is quashed by a reviewing

105 *Id.*, art. 152(4).

106 *Id.*, art. 154.

107 *Id.*, art. 155.

108 *Id.*, art. 158(1).

109 *Id.*, art. 158(2).

110 *Id.*, art. 160, 161.

authority and no new trial is ordered, the accused is deemed to have been acquitted by the service tribunal.¹¹¹

A reviewing authority may also quash punishments that he or she considers are wrong in law, or excessive.¹¹² Aside from this, a wide range of punishments (including any period of imprisonment) do not take effect unless approved by a reviewing authority.¹¹³ A reviewing authority may quash the punishment or substitute another (lesser) punishment that would be permissible under relevant provisions.¹¹⁴

Independently of the automatic review process, a person convicted by a court martial or a Defence Force magistrate (or, in some circumstances, a person acquitted by reason of unsound mind) may appeal to the Defence Force Discipline Appeal Tribunal on a question of law (or, with leave, a question of fact).¹¹⁵ The Tribunal members are judges of the Federal Court, and the Tribunal President is the current Judge Advocate General.¹¹⁶ Questions of law arising in Tribunal proceedings may be referred, and appeals from the Tribunal on questions of law may be made, to the Federal Court of Australia.¹¹⁷ Where a convicted person makes an appeal, the procedures for automatic review are suspended, unless the Defence Force Discipline Appeal Tribunal dismisses the appeal or the application for leave to appeal.¹¹⁸

111 *Id.*, art. 159.

112 *Id.*, art. 162.

113 *Id.*, art. 172.

114 *Id.*, art. 169.

115 *Defence Force Discipline Appeal Act 1955*, art. 20.

116 Judge Advocate General, *Defence Force Discipline Act 1982: Report for the Period 1 January to 31 December 2010*, [3] (available at: www.defence.gov.au/JAG/reports.htm) (hereinafter: *JAG Annual Report 2010*).

117 *Defence Force Discipline Appeal Tribunal Act 1955*, art. 51, 52.

118 *DFDA*, *supra* note 3, art. 156.

E. *What is the basis for jurisdiction over LOAC breaches under military law (territoriality, nationality, passive personality, protective jurisdiction)?*

57. As noted in [30] above, s 61 of the *DFDA* extends the application of the general criminal law extra-territorially for all “defence members” and “defence civilians” (as to which see [58] below).

F. *Who is subject to military law? Can military jurisdiction be exercised over civilians and if so under what circumstances?*

58. As noted in [53], the *DFDA* applies to “defence members” (members of the permanent or regular forces, or members of the reserves rendering continuous fulltime service, or on duty or in uniform) and “defence civilians” (persons who, with authority, accompany a part of the Defence Force outside Australia or on operations against the enemy, or who has consented in writing to subject him or herself to Defence Force discipline).¹¹⁹ Such consent may be required as a condition of access to operational areas.

G. *What disciplinary or punitive actions can be taken when a violation of LOAC is determined to have occurred (e.g., censure, reprimand, discharge from service, imprisonment)?*

59. The punishments that may be imposed in the disciplinary system depend on the nature of the offence,¹²⁰ the jurisdiction of the type of service tribunal (summary authority, Defence Force magistrate or court martial) trying the offence, and the rank of the accused. As a general matter, summary authorities are generally authorised to impose fines up to a certain thresholds, reprimands and other penalties such as extra duties on convicted members of the Defence Force (persons who are not members

¹¹⁹ *Id.*, art. 3.

¹²⁰ Recall that an offence under art. 61 of the *DFDA*, *supra* note 3 (ie, an offence against the generally applicable Australian criminal law) attracts the same penalty or maximum penalty as would the offence under Australian criminal law.

of the ADF, such as “defence civilians”, are not subject to many of these punishments). Commanding officers (as summary authorities) may impose short periods of military detention on lower-ranking offenders.¹²¹ Defence Force magistrates and restricted courts martial may impose sentences of imprisonment or detention, but not for periods exceeding six months. General courts martial may impose sentences of imprisonment of any duration, including life imprisonment.¹²²

Sentencing is subject to detailed statutory guidance¹²³ and, in sentencing an individual, a service tribunal is required to have regard to both the principles applied in civilian courts from time to time, and the need to maintain discipline in the ADF.¹²⁴ As noted in [54]-[56] above, in many cases, punishments may not take effect until they are approved by a reviewing authority.

As discussed in [54]-[56] above, it is not unusual for disciplinary and administrative penalties to be applied in relation to the same conduct. Clearly any decision to impose administrative penalties must take cognisance of any disciplinary penalties already applied. Administrative penalties could include posting penalties (either posting out from a particular position or ineligibility for a particular position), ineligibility for promotion consideration, termination of service, being placed on a warning, reduction in rank for inefficiency etc.

H. *Describe the leadership structure of the military legal system. If there is a military attorney general, JAG or equivalent person, what is the role of that individual? Does he/she provide advice to commanders, supervise the military legal system, oversee military justice? What are his/her authority*

121 For detailed scheme of penalties that may be imposed by summary authorities, see *DFDA*, *supra* note 3, art. 67, Schedule 3.

122 *Id.*, art. 67, Schedule 2.

123 *Id.*, Part IV.

124 *Id.*, art. 70.

within the military justice system and his/her relationship to military criminal investigators and other investigators?

60. Judge Advocate General: There is no position of Military Attorney General in the Australian military justice system. There is a statutory office of the JAG.¹²⁵ The JAG is appointed by the Governor-General,¹²⁶ and must either be, or have been, a judge of a federal court, or of a State or Territory Supreme Court.¹²⁷ The JAG may be a Defence member,¹²⁸ and the current and previous JAGs have been two-star ranking officers of the Reserve Forces.¹²⁹

The fact that the JAG holds civilian judicial office, and has held senior military rank, has meant that the JAG has had a leadership role among military legal officers, and “plays a significant role in the promotion of the jurisprudential welfare and education of the ADF”.¹³⁰ However, the JAG does not have command or administrative responsibility for legal officers, and is not a part of the chain of command.¹³¹

The duties of the JAG include:¹³²

- reporting annually to Parliament on the operation of the *Defence Force Discipline Act* and associated regulations and rules of procedure, and the operation of any other law of the Commonwealth relating to the discipline of the Defence Force;¹³³

¹²⁵ *Id.*, art. 179.

¹²⁶ *Id.*; The Minister for Defence may appoint an acting officeholder to the position for a 12 month period, See *Id.*, art. 188.

¹²⁷ *Id.*, art. 180(1).

¹²⁸ *Id.*, art. 180(3).

¹²⁹ *JAG Annual Report 2010*, *supra* note 116 [6].

¹³⁰ *Id.* [6]-[7].

¹³¹ *Id.* [6].

¹³² *Id.* [4].

¹³³ *DFDA*, *supra* note 3, art. 196A.

- making procedural rules for service tribunals;
- nominating the judge advocate for a court martial;¹³⁴
- nominating Defence Force magistrates to try charges;¹³⁵
- nominating to the relevant service chief officers to be members of the panel of judge advocates,¹³⁶ and nominating (from this panel) officers to serve as Defence Force magistrates;¹³⁷ and
- recommending to the relevant service chief legal officers able to provide a report on court martial or Defence Force magistrate proceedings to assist a reviewing authority.¹³⁸

Thus, the JAG has general oversight of the operation of the military justice system but does not review decisions of courts martial or Defence Force magistrates (other than in situations in which the Chief of the Defence Force or a service chief undertakes a further review of a service tribunal proceeding and requires a legal report¹³⁹). The JAG does not have any relationship with investigators or any role in prosecution. Nor does the JAG function as a legal adviser to either the ADF or the Government, as that would be inconsistent with judicial office.¹⁴⁰

61. Director of Military Prosecutions: There is a statutory office of Director of Military Prosecutions.¹⁴¹ The DMP is appointed for a fixed term not exceeding five years (and eligible for reappointment for a total tenure of up to ten years) by the Minister for Defence.¹⁴² To be eligible

¹³⁴ *Id.*, art. 129B(2).

¹³⁵ *Id.*, art. 129C.

¹³⁶ *Id.*, art. 196.

¹³⁷ *Id.*, art. 127.

¹³⁸ *Id.*, art. 154(1)(a).

¹³⁹ *Id.*, art. 155(3); see [56] above.

¹⁴⁰ *JAG Annual Report 2010*, *supra* note 116 [8].

¹⁴¹ *DFDA*, *supra* note 3, art. 188G.

¹⁴² *Id.*, art. 188GF, GH.

for the office of DMP an individual must have been enrolled as a legal practitioner for at least five years, be a member of one of the services or the Reserves rendering full-time service, and hold a rank not lower than one star general - at the naval rank of commodore or equivalent.¹⁴³

The functions of the DMP include:¹⁴⁴

- carrying on prosecutions for service offences in proceedings before a court martial or a Defence Force magistrate;
- seeking the consent of the DPP as required by *DFDA* s 63 (for prosecutions of certain serious offences under the generally applicable criminal law, where the alleged offence occurred within Australia);
- making statements or giving information to particular persons or to the public relating to the exercise of powers or the performance of duties or functions under the *DFDA*; and
- representing the service chiefs in proceedings before the Defence Force Discipline Appeal Tribunal.

The DMP stands outside the military chain of command, reports to the Minister for Defence and so enjoys an important independence of office.

62. Head, Defence Legal Division: The Department of Defence's Legal Division is responsible for the provision of legal advice and other legal services to the Australian Defence Force, the Minister of Defence and the Department of Defence. The Head of the Legal Division oversees an integrated (military and civilian) legal capacity which includes the ADF Legal Services Branch. The Director General of ADF Legal Services

¹⁴³ *Id.*, art. 188GG.

¹⁴⁴ *Id.*, art. 188GA.

(DGADFLS) is appointed by the CDF for a fixed term and the position is not a statutory one. DGADFLS acts as the principal ADF legal adviser in the areas of military administrative law, military operations law (including LOAC) and military discipline law. DGADFLS manages the resources and retains professional oversight over all ADF legal officers throughout Australia and overseas (including those on ADF deployments).

The ADF Legal Services Branch consists of several directorates, of which the three most relevant to LOAC are the Directorate of Operations and International Law and the Directorate of Military Discipline Law and the Directorate of Military Administrative Law. The ADF Legal Services do not manage the military justice system although ADF Legal Officers are provided to staff the offices of the JAG, the DMP and other senior participants in the military justice system.

I. *To whom does the aforementioned person report? What authority does that superior exercise over him or her?*

63. The JAG and the DMP both report to the Minister for Defence and, consequently, operate outside the military chain of command. That reporting line gives them both independence of office reflective of the sensitivities of their respective positions and of the importance, particularly for the DMP, of the perception of independence from any undue military influence.

Head, Defence Legal Division and the Director-General of ADF Legal Services are appointed by the Secretary of the Department of Defence and the CDF respectively.

J. *What, if any, safeguards are in place (under law, regulation, policy or practice) to ensure the independence and impartiality of the various actors in the military who might be involved in the investigation or prosecution of*

alleged LOAC violations? Is there any relevant case law?

64. There are safeguards attaching to particular offices, some of which have already been mentioned in [60]-[63] above, and more systemic safeguards operating across the system.

As to the independence of ADFIS and the service police, see [54]-[56] above and [67] below.

65. The independence of the DMP was demonstrated in connection with recent general court martial proceedings against SGT J and LCPL D (names suppressed by court order). This is the same case discussed above in [52] and again in further detail in [83] below. The DMP chose to lay charges of manslaughter by criminal negligence against the two co-accused and that decision was controversial because the DMP did not allege a violation of LOAC. Instead, she claimed, ADF members are obliged to maintain a higher standard than that imposed by LOAC. It would have been unlawful for any person, even the Minister for Defence or the Attorney-General, to interfere with the independence of the DMP's office by encouraging her to drop the charges. As it happened, the charges were contested before a preliminary hearing of the general court martial and the ADF Chief Judge Advocate dismissed them. That was the appropriate forum to legally challenge the charges and the experience confirmed the independence of the DMP's office.

66. One systemic safeguard for the effective exercise of independence is the statutory office of Inspector-General of the Australian Defence Force (IGADF). The office of IGADF is intended to provide the Chief of the Defence Force with a mechanism for internal audit and review of the military justice system, independent of the ordinary chain of command, and with an avenue by which failures and flaws in the military justice system can be exposed and examined so that causes of injustice (systemic

or otherwise) can be remedied.¹⁴⁵ The duties of the IGADF include inquiring into matters concerning the military justice system; conducting performance reviews of the system, including internal audits, as the IGADF considers appropriate; advising on matters concerning the military justice system, including making recommendations for improvements; and promoting military justice values across the ADF.¹⁴⁶ The IGADF may initiate inquiries on his or her own motion, or be requested to do so by the Chief of the Defence Force, a service chief or any other individual.¹⁴⁷ The IGADF has adopted a practice of conducting random audits of military justice practices, procedures, processes, training and competencies in ADF units and, while it investigates such matters as abuse of authority and lack of procedural fairness, the IGADF may also look into instances of alleged cover-up or failure to act.¹⁴⁸

K. *Do military investigative authorities act independently or are they subject to the direction of commanders, military legal officers, prosecutors or other actors?*

67. ADFIS is under the command of the Provost Marshal, who reports to the Chief of the Defence Force. As already discussed above in [51], this line of reporting guarantees ADFIS a significant degree of independence from the operational chain of command.

ADFIS personnel are not subject to direction from ADF legal officers in-theatre. ADFIS has its own in-house legal advice at its Australian headquarters and so would not require legal advice from in-theatre ADF

¹⁴⁵ *Defence Act 1903*, art. 110A.

¹⁴⁶ *Id.*, art. 110C.

¹⁴⁷ Although the IGADF need not comply with requests from individuals other than the Chief of the Defence Force, See: *Id.*, art. 110D.

¹⁴⁸ Inspector General of the Australian Defence Force Fact Sheet (*available at*: www.defence.gov.au/mjs/resources/IGADF%20fact%20sheet.pdf);

Defence Annual Report 2009-2010, vol 1, 162-163 (*available at*: www.defence.gov.au/Budget/09-10/dar/index.htm).

legal officers. In any case, in-theatre legal officers are required to advise in-theatre command and ought not be distracted from that principal responsibility to provide legal support to ADFIS in the course of an investigation. It is highly likely that in relation to any specific in-theatre investigation ADFIS undertakes, ADF legal officers will have had some involvement in the preparation or review of notifiable incident reports, quick assessments and/or administrative inquiries and so may well be interviewed by ADFIS personnel.

L. *What is the role of the commander or other senior military personnel with regard to a possible LOAC violation? Is their involvement limited in any way? Do they shoulder any particular responsibilities?*

68. The role of the commander in relation to a possible LOAC violation is to facilitate all required reporting and subsequent investigations, including preservation of evidence, as detailed in [48] above.

If an alleged violation is pursued as a disciplinary offence the commander may well have a role as a summary authority or in connection with summary authority proceedings. Commanders may also have a role (as reviewing authorities) in reviewing the verdict and approving the punishment of a service tribunal (but only if they were not involved in the laying of the original charges). Reviewing authorities are assisted by reports from legal officers, and are bound by those reports in the review process insofar as any question of law is concerned: see [56] above.

M. *Is there civilian oversight over the military system and its various actors (e.g. courts, civilian attorney general)?*

69. There is civilian oversight of the military justice system in various respects. The military justice system has its basis in statute, and is thus subject to Parliamentary control, and ultimately to the Constitution.

The High Court has a constitutionally entrenched original jurisdiction in respect of constitutional writs, guaranteeing its capacity to function as the ultimate arbiter of the legality of conduct of ADF personnel and institutions.¹⁴⁹

Individual decisions of general courts martial are reviewable, at least on a question of law, by the Defence Force Discipline Appeal Tribunal, the Federal Court of Australia, and ultimately (with leave) the High Court of Australia.

The Judge Advocate General reports to the Minister for Defence. In particular, the JAG must report annually to the Minister on the general operation of the military justice system, and this report is required to be tabled in Parliament.¹⁵⁰

There have been a series of Parliamentary inquiries and other public inquiries into the operation of the military justice system, and these have played an important role in shaping changes to the system.¹⁵¹

149 Constitution, art. 75; In the case of *Lane v Morrison*, discussed in [10], the plaintiff sought a writ of prohibition directed to the Military Judge nominated to hear the plaintiff's case.

150 *DFDA*, *supra* note 3, art. 196A.

151 See, eg, reference to previous inquiries and their results in *Senate Committee report*, *supra* note 8.

APPLICATION OF THE POLICY IN PRACTICE

A. *If the military and civilian systems both have authority over incidents involving possible LOAC violations, what are the criteria used to determine which system handles the matter? Specifically, explain the interface between civilian and military systems in the investigation and prosecution of alleged breaches of LOAC.*

70. As noted in [2]-[5] above, the military justice system retains statutory jurisdiction in respect of all service offences (which would include violations of LOAC as both service offences and civilian offences). However, the DMP has a Memorandum of Understanding with the Directors of Public Prosecution around Australia to the effect that in relation to those service offences which would also constitute civilian offences, the DMP will consult with the relevant DPP before laying charges under the military justice system - in effect to reach agreement on the forum for prosecution and trial. Under the terms of this MoU, it seems unlikely that any allegation of a serious violation of LOAC by an ADF member would be dealt with by the military justice system rather than the civilian system.

B. *What are the reporting requirements regarding allegations of wrongdoing (e.g. are allegations reported, to what authority and in what time period)?*

71. Reporting arrangements for “notifiable incidents” are detailed in [48] above. Those reports are forwarded to appropriate entities for decisions on follow-up inquiries or investigations.

C. *Can complaints of alleged LOAC violations be made directly to the military or the civilian police?*

72. If the person who wishes to make the complaint is a current ADF

member, that member is obliged to report the incident to their commander and the commander is obliged to report it to Defence Investigative Authorities (usually, ADFIS given the seriousness of the allegation). An alleged violation of LOAC would fall within the definition of a notifiable incident. In accordance with DI(G) ADMIN 45-2, the reporting and management of notifiable incidents by all ADF personnel, including when on operations, is mandatory and a reasonable suspicion that an offence (whether it be a service offence or an offence against Commonwealth or State or Territory law) has been committed constitutes a notifiable incident. Personnel have a responsibility to report a notifiable incident. The death or serious injury of non-Defence personnel (excluding enemy combatants who are not in ADF custody or effective control) is a notifiable incident even when there are no grounds to suspect an offence was committed.

If the person wishing to make the complaint was formerly but no longer an ADF member, then a complaint may be made to civilian police and the civilian police will be guided by the MoU between the DMP and DsPP as to the appropriate body to investigate the complaint. There is no specific procedure for an affected civilian or the family of civilian victims to make a complaint of an ADF violation of LOAC.

D. *What is the policy regarding investigation of an alleged LOAC violation by military personnel? Who decides whether an operational inquiry (e.g. by unit military personnel) or criminal investigation is conducted?*

73. For further detail, see [47]-[51] above.

“Notifiable incidents” are reported promptly both to the chain of command and to ADFIS, the unit charged with criminal investigations. “Notifiable incidents” include both suspected violations of the *DFDA* (including, for example, LOAC violations), and the death, serious injury or disappearance of non-Defence personnel (other than enemy combatants)

involving any Defence activity, property or premises, *even where there may be no reasonable suspicion of an offence.*

74. In the case of a suspected LOAC violation, ADFIS would open a criminal investigation. Only the Chief of the Defence Force, Commander Joint Operations, Vice Chief of the Defence Force and the service chiefs may request in writing that an investigation be suspended, and only the Provost Marshal of ADFIS has the authority to suspend or cease an investigation. If a criminal investigation is opened, administrative processes such as the QA may be conducted at the same time, but those conducting them must liaise with ADFIS to ensure that they do not interfere with the criminal investigation.

75. In the case of an incident of civilian death or serious injury where there was no suspicion, at least at first sight, that an offence had been committed, ADFIS would still receive the incident report and copy of the QA. The Commander Joint Operations would review the incident report and QA and determine whether an Inquiry Officer ought to be tasked to undertake an administrative inquiry. There is no publicly accessible ADF policy to conduct a further administrative inquiry in all cases of civilian death although there have certainly been multiple inquiries into civilian deaths in the course of military operations. Any such inquiry is not an operational inquiry by unit military personnel; as explained in more detail above at [50], the inquiry is conducted by an officer from a different unit or from outside the theatre of operations appointed specifically to undertake the task. The Chief of the Defence Force is required to initiate an inquiry into any death or suicide of an ADF member in the course of military operations.¹⁵²

76. If the report of the Inquiry Officer indicated that there may have been a violation of LOAC, the Commander Joint Operations (in consultation

¹⁵² See Regulations 109(1)(a) of the Defence Inquiry Regulations 1985.

with the Chief of the Defence Force, and the Chief of the relevant service) would recommend to ADFIS the conduct of a criminal investigation (if ADFIS has not already commenced such an investigation).

E. *Regarding such investigations, what are the criteria to launch an investigation or other inquiry (e.g. reasonable suspicion, belief that an offence has been committed, etc.)?*

77. There is no publicly accessible statement of ADFIS policy on the triggering thresholds for the initiation of a criminal investigation and nor is there any publicly accessible statement of ADF policy on the triggering thresholds for an administrative inquiry in response to a report of a notifiable incident and subsequent quick assessment. The decision to launch an administrative inquiry lies with the ADF executive leadership and the decision to launch an investigation or not is at the discretion of the ADFIS organisation and its head - the ADF Provost Marshal. We simply do not know what the requisite thresholds are and whether, in the case of ADFIS, the threshold is reasonable suspicion of the perpetration of an offence or belief that an offence has actually been committed. In the absence of any access to a clearly articulated policy, it is impossible to know whether there is any consistency of approach and, if so, the bases for such consistency.

78. This relative lack of transparency is in stark contrast to the DMP who has published a Directive on Prosecution and Disclosure Policy.¹⁵³ The Directive articulates the factors which are taken into account in any decision whether or not to lay charges. In the words of the Directive itself:

The initial decision as to whether to prosecute is the most important step in the prosecution process. A wrong decision to

¹⁵³ See Director of Military Prosecutions Directive 02/2009 - Prosecution and Disclosure Policy, available at: www.defence.gov.au/legal/pdf/ddcs/dmp-2-2009.pdf.

prosecute, or conversely a wrong decision not to prosecute, tends to undermine confidence in the military discipline system. It is therefore important that the decision to prosecute (or not to prosecute) be made fairly and for appropriate reasons. It is also important that any subsequent decision not to proceed with a charge is made fairly and for appropriate reasons and that care is taken in the selection of the charges that are to be laid. In short, decisions made in respect of the prosecution of Service offences under the DFDA must be capable of withstanding scrutiny. Finally, it is in the interests of all that decisions in respect of DFDA prosecutions are made expeditiously.

F. *If during an operational investigation or other inquiry by the chain of command it appears that a crime may have been committed, is it required that the matter be referred for criminal investigation? If so, under what circumstances?*

79. As noted in [50] and [74]-[75] above, if an administrative inquiry reveals evidence that an offence may have been committed CJOPS and others who receive the Inquiry's Officer's Report must refer the matter to ADFIS if the organisation has not already had the matter referred. It is entirely up to ADFIS whether or not to initiate a criminal investigation.

G. *What circumstances in cases involving civilian death or injury or damage to civilian property require that an investigation or inquiry be conducted? Is there a requirement that every death or every civilian death be investigated? Is this a legal requirement or one of policy? Does it extend to cases in which a military objective is attacked and collateral damage or incidental injury occurs?*

80. See [47]-[51] above. Pursuant to DI(G) ADMIN 45-2, any ADF action which results in civilian death or damage to civilian property (including collateral damage or incidental injury) is a notifiable incident and must be reported to ADFIS or the relevant service police. It is for ADFIS or the

service police to decide whether to initiate a criminal investigation, refer the matter to the civilian authorities or to take no further action. It is for the commanding officer and senior ADF leadership to determine whether or not an administrative inquiry is warranted. There is no articulated policy to automatically initiate an administrative inquiry into every ADF incident resulting in civilian death or damage to civilian property.

H. *What access do affected civilians, including non-citizens and residents of other countries, have to the investigation, its results and any court proceedings?*

81. Criminal investigations by ADFIS remain confidential, at least until any charges are laid and court martial proceedings initiated. The most common form of administrative inquiry undertaken in cases of civilian death, inquiry by an Inquiry Officer, is also to be conducted in private, although a redacted form of the final report may be made publicly available.¹⁵⁴ The Minister authorises the release of Inquiry Reports in accordance with Regulation 63 of the *Defence (Inquiry) Regulations 1985*.

82. Proceedings before a Defence Force magistrate or court martial are required to be held in public, although the President of the court martial, or the Defence Force magistrate, may order that some part of the proceedings be closed, or not reported, if he or she considers this necessary in the interests of the security or defence of Australia, the proper administration of justice, or public morals. Subject to any order closing the proceedings, if the proceedings are being held at a place guarded by constables or by members of the Defence Force, the appropriate service chief is required to take steps to permit the public to have reasonable access to the proceedings.¹⁵⁵ Occasionally disclosure of reasons for a decision will be required by Court order. Otherwise, a request for disclosure can be made of the Minister and

¹⁵⁴ See www.defence.gov.au/coi/index.htm, for examples of publicly available Inquiry Reports.

¹⁵⁵ *DFDA*, *supra* note 3, art. 140.

also via extant Freedom of Information provisions.

I. *What role, if any, do human rights groups have in initiating or conducting any inquiry into alleged LOAC violations?*

83. Human rights groups have no formal role in initiating or conducting any inquiry by the ADF into alleged LOAC violations. As a practical matter, however, human rights groups in Australia (as elsewhere) play a role in bringing possible LOAC violations to public attention, sometimes spurring investigations within the military, Parliament or Government departments.

J. *Please provide available statistics regarding the investigations or other inquiries and prosecutions of alleged LOAC violations (e.g. numbers of complaints, matters investigated, charges laid, non-judicial action, trials, verdicts - please include civil and military).*

84. There have been no prosecutions in Australia of alleged ADF violations of LOAC.

The recent court martial proceedings against SGT J and LCPL D, referred to in [52] above, are the closest the ADF has come but, as explained earlier, the DMP did not allege any violations of LOAC. The co-accused objected to the charge of negligent manslaughter on the basis that, among other things, the DMP had not alleged a violation of LOAC. The ADF Chief Judge Advocate, presiding over the general court martial, dismissed the charges on the basis of his view that ADF members could not be convicted of service offences allegedly committed when engaged in operations against an enemy in an armed conflict on the basis of negligence.

85. There were some allegations of wrongdoing, including mistreatment of detainees and illegal killing, during ADF deployments in East Timor. An

investigation launched by the Chief of the Defence Force concluded that the illegal killing allegations were unfounded. A second investigation, later opened by the military police, was very extensive (involving a large number of witnesses, and exhumation of the bodies of militia members). A member of the Special Air Services was ultimately charged with mistreating the corpse of a militia member and, in the alternate, prejudicial conduct. Although there were concerns about some aspects of the treatment of detainees, the investigation concluded that no other offences had been committed.¹⁵⁶ A Defence Force magistrate found the accused member of the Special Air Services not guilty of the charge of mistreatment of a corpse. The entire investigative process was subject to criticism, but primarily on the grounds that it was overly burdensome on the individuals accused of wrongdoing, was based on innuendo rather than evidence, and that it was overly protracted and costly.¹⁵⁷

86. There have been a number of administrative inquiries and investigations by ADFIS into allegations or circumstances which, if substantiated, might amount to violations of LOAC. However (at least insofar as publicly available reports of administrative inquiries are concerned), these investigations have concluded that other evidence available did not suggest wrongdoing that merited criminal investigation or disciplinary action.¹⁵⁸

156 Transcript of Media Briefing by LTGEN Peter Leahy, Chief of Army, Results of investigation into allegations against Australian Soldiers in East Timor (Apr. 16, 2003) *available at*: www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=2632.

157 See *Senate Committee report*, *supra* note 8, at Chapter 3 [3.27]-[3.52].

158 See, eg, *Report of an Inquiry Officer into the Shooting of two Afghan National Policemen, 11 August 2009* (Jun. 28, 2010);

Report of Inquiry Officer - Possible civilian casualties resulting from clearance of a compound at [REDACTED], Afghanistan on 2 April 2009 (Dec. 18, 2009);

Report of Inquiry Officer - Possible civilian casualties from close air support strike at [REDACTED], Afghanistan on 28 April 2009 (Dec. 18, 2009);

Inquiry Officer's Report into an allegation that an indirect fire mission by Special Operations Task Group in Afghanistan on 5 January 2009 caused a number of Unintended Civilian Casualties (May 28, 2009);

Inquiry Officer's Report into the detention of local nationals on 29-30 April 2008 in Oruzgan Province, Afghanistan (Aug. 29, 2008);

Inquiry Officer's Report into Collateral Damage and Allegations of Mistreatment of a Local National in Afghanistan on 23 Nov 07 (May 12, 2008);

K. *Have any senior military or security service personnel or senior government officials ever been investigated or prosecuted for possible LOAC violations, or for being responsible for such violations (e.g. by ordering, approving, tolerating, ignoring or covering up violations)?*

87. There have been no formal disciplinary or criminal investigations of senior military or Government personnel in connection with such violations. There was a parliamentary inquiry dealing briefly with reporting within the military and Department of Defence regarding abuses at Abu Ghraib (discussed in [28] above). However, this was a factual inquiry only. See also the discussion of Mamdouh Habib's litigation against the Australian Government above at [44].

L. *What examples are available concerning investigations or other inquiries of alleged LOAC violations regarding the following types of incidents (please indicate their outcome).*

88. As noted [83]-[85] above, there have been very few reports or complaints of conduct by ADF members or civilian personnel that might amount to a violation of LOAC. There have been administrative inquiries and investigations by ADFIS into allegations or circumstances which, if substantiated, might conceivably amount to violations of LOAC, but none of these inquiries have confirmed the existence of possible LOAC violations or recommended disciplinary or criminal proceedings.

1. *Theft/assault or alleged mistreatment of civilians (not taking a direct part in hostilities);*
2. *Mistreatment of detainees including during interrogation;*

(all available at: www.defence.gov.au/coi/index.htm).

See, eg:

- “Inquiry Officer’s Report into the detention of local nationals on 29-30 April 2008 in Oruzgan Province, Afghanistan” (Aug. 29, 2008); and
- “Inquiry Officer’s Report into Collateral Damage and Allegations of Mistreatment of a Local National in Afghanistan on 23 Nov 07” (May 12, 2008).

(both reports *available at*: www.defence.gov.au/coi/index.htm).

3. *Use of force while helping maintain law and order (either directly or in support of police forces) in occupied territories;*
4. *Use of force while seeking to arrest or detain a civilian taking a direct part in hostilities;*
5. *Use of force at a checkpoint or during a similar operation;*
6. *Targeting civilians taking a direct part in hostilities;*
7. *Use of force against a member of an organized armed group or terrorist organization in the context of an armed conflict;*

See reference to inquiry regarding deployment in East Timor, in [29] above.

8. *Use of force against an enemy which resulted in collateral civilian casualties;*

See, eg:

- “Report of Inquiry Officer - Possible civilian casualties resulting

from clearance of a compound at [REDACTED], Afghanistan on 2 April 2009” (Dec. 18, 2009);

- “Report of Inquiry Officer - Possible civilian casualties from close air support strike at [REDACTED], Afghanistan on 28 April 2009” (Dec. 18, 2009);
- “Inquiry Officer’s Report into an allegation that an indirect fire mission by Special Operations Task Group in Afghanistan on 5 January 2009 caused a number of Unintended Civilian Casualties” (May 28, 2009); and
- “Inquiry Officer’s Report into Collateral Damage and Allegations of Mistreatment of a Local National in Afghanistan on 23 Nov 07” (May 12, 2008).

(all *available at*: www.defence.gov.au/coi/index.htm).

9. *Any other relevant case.*

COMPARATIVE STUDY OF OTHER SYSTEMS FOR INVESTIGATING ALLEGED LOAC BREACHES: THE LAW OF THE UNITED KINGDOM

Professor Peter Rowe*

July 2011**

1. GENERAL

(a) *General description of the national system for investigation and prosecution of alleged LOAC violations. In particular, describe whether they have been handled within the civilian or military justice systems.*

1.01 In modern times any alleged breaches of LOAC have occurred outside the United Kingdom (UK). The ‘troubles’ in Northern Ireland, between 1969-1998, were considered by the UK Government as not amounting to an ‘armed conflict’.¹ The ordinary civilian law applicable in Northern Ireland at the time applied to the activities of the British armed forces. Thus, soldiers on duty who shot and killed anyone, whether alleged terrorist suspects or not, were subject to the civilian law. Investigations were conducted by the local police force (at the time, the Royal Ulster Constabulary) with assistance from the Army authorities. Trial was before the ordinary criminal courts, conducted before a High Court judge sitting without a jury. This form of trial applied also to alleged terrorists charged with, for instance, killing a soldier. At the time there was a limitation on

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** Amended to take into account two decisions of the Grand Chamber of the European Court of Human Rights on 7 July 2011 and the comments of the reviewer.

1 This was the view (partially) also of Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* 6 (2010), who commented that it was “likely that the conflict in Northern Ireland, *apart perhaps from a few years in the early 1970s*, has never been intense enough to qualify as an ‘armed conflict’ for the purposes of Article 3 [of the Geneva Conventions 1949]”, (italics supplied). *Prosecutor v. Tadic* (Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, at para. 70, referred to ‘protracted armed violence’ of which intensity plays a part, see *Prosecutor v. Boskoski and others* (2010) IT-04-82-A, para. 22.

courts-martial trying the crime of murder or manslaughter committed within the UK.²

1.02 As a result of alleged breaches of LOAC occurring outside the UK it is important that the law of the UK³ applies to members of the armed forces serving abroad. The Armed Forces Act 2006 applies to those subject to Service law (broadly, members of the armed forces) and to civilians subject to Service discipline (broadly, those with some connection with the armed forces, usually outside the UK).⁴ By s. 42 the criminal law of England and Wales is brought within the ambit of the Act so that any criminal offence which could have been tried in England and Wales had it been committed there will be an offence under the 2006 Act and can be dealt with under Service law. In addition, the 2006 Act establishes a number of Service offences which can be committed outside the UK.

1.03 It is possible also that torts committed by members of the British armed forces serving abroad during an armed conflict could be subject to the jurisdiction of the English civil courts.⁵

1.04 It is likely that any alleged LOAC breaches would be tried by the Court Martial, which can sit anywhere in the world.⁶ For less serious

2 The Army Act 1955, s.70(4). Now repealed by the Armed Forces Act 2006, *available at*: www.legislation.gov.uk/ukpga/2006/52/contents. The 1955 Act was repealed and the 2006 did not include any provision similar to s.70(4).

3 Strictly speaking, it is the law of England and Wales. I will refer to the law of England merely as shorthand. Scotland has its own distinct legal system whilst that of Northern Ireland is similar to, but not identical with, that of England. There is no system of 'British' law. Although the armed forces are the armed forces of the UK it is common to refer to them also as British armed forces.

4 There is now no use of the term 'military' law. The Armed Forces Act 2006 amalgamated the three separate systems of military, air force and naval law into 'Service law', to which all members of the British armed forces are subject, whether they are serving in the Royal Navy, the Army or the Royal Air Force. For further discussion of those who are subject to Service law see para. 3.21 below.

5 *Bici v. Ministry of Defence* [2004] EWHC 786 (QBD). This case was decided by the High Court in London on the basis that both parties agreed to apply English law to the acts of British soldiers, who shot and killed a civilian in Kosovo during NATO military operations there. However, it is possible that proceedings could be brought under the Human Rights Act 1988, s.7 providing that the victim of the unlawful act was within the jurisdiction of the UK. For discussion of the phrase 'with its jurisdiction' in the European Convention on Human Rights 1950 see para 1.25. See also the case of *Mulcahy v. Ministry of Defence* (1996) discussed in footnote 64.

6 The Armed Forces Act 2006, s. 154(2), including within the UK. The 2006 Act did not make any

breaches a soldier⁷ may face a hearing before his commanding officer.⁸

1.05 Any potential conflict of jurisdiction between the jurisdiction of the territorial State (as the receiving State) and that of the UK (as the sending State) will normally be resolved through a status of forces agreement.⁹ Apart from long term base arrangements¹⁰ it has become common for the UK to arrange that it should have exclusive jurisdiction over any alleged crime committed by a member of its armed forces.¹¹ Such an arrangement will include custody of the soldier concerned, any investigation and trial.

1.06 The criminal law of the UK will normally require any alleged offence to have been committed within its territorial limits. Apart from the provisions of the Armed Forces Act 2006 discussed above a small number of offences, committed by UK nationals or residents¹² outside these territorial limits, could be tried by a court in the UK. The most relevant in the LOAC context are the crimes of murder and manslaughter, a grave breach of the Geneva Conventions 1949 or of Additional Protocol I and crimes under the International Criminal Court Act 2006. The significance of this extra-territorial jurisdiction is that the courts of the UK retain jurisdiction over

change in the law on this point. It has, in modern times, always been possible to hold a court-martial (as it was styled prior to the 2006 Act) anywhere in the world. It is, however, common to hold Court Martial trials in England where the alleged offence occurred abroad, although this may not always be the case, see *Martin v. United Kingdom*, Application No 40426/98, Judgment (Oct. 24, 2006) (where a civilian subject to military law at the time was tried for the murder of a German civilian by a British court-martial in Germany).

7 For the sake of convenience the term 'soldier' will be adopted despite the fact that the British 'regular forces' are comprised of the Royal Navy, the Royal Marines, the regular Army, the Royal Air Force and the 'reserve forces' are the Royal Fleet Reserve, the Royal Naval Reserve, the Royal Marines Reserve, the Army Reserve, the Territorial Army, the Royal Air Force Reserve, the Royal Auxilliary Air Force, s. 374, Armed Forces Act 2006. The term 'soldier' will be used as shorthand for any member of the above and it includes both male and female.

8 Armed Forces Act 2006, s.52 and sections 129-152. As an alternative, administrative action is available to deal with members of the armed forces whose performance is inadequate.

9 Or a memorandum of understanding between the sending and receiving States.

10 For example, the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, 1951 (as supplemented).

11 This also includes British civilians subject to Service discipline.

12 Some offences apply also to anyone, whatever their nationality, such as the Geneva Conventions Act 1957 (as amended), s. 1 (a grave breach of the Geneva Conventions 1949 or of Additional Protocol I, 1977). This is discussed in more detail at para. 1.42 below.

a British national who is alleged to have committed any one of these crimes abroad. In consequence there are two possible avenues for dealing with a soldier alleged to have committed a LOAC violation, namely, UK civilian jurisdiction and UK armed forces jurisdiction under the Armed Forces Act 2006.

1.07 Until the Armed Forces Act 2006 a commanding officer had the power to dismiss a charge against a soldier. By doing so this would prevent any further exercise of armed forces jurisdiction in relation to that matter. In consequence, the only possible jurisdiction which remained was that of the UK civilian criminal law system. The commanding officer's decision could have no effect on this jurisdiction. There is one case where this problem arose.¹³ The Armed Forces Act 2006 now prevents a commanding officer from dismissing a case himself. Only the Service Prosecuting Authority (headed by a civilian lawyer) can now do this. The effect of this change in the law is significant. It means that once a charge against a soldier has been brought a member of the armed forces (whether a commanding officer or an officer of higher in rank) has no power to dismiss it.

1.08 Apart from the case referred to in para 1.7 the practice has been for the UK to exercise its armed forces jurisdiction in respect of all alleged LOAC violations committed outside the UK. This makes practical sense since any incidents can be investigated by the Service police¹⁴ and the soldier will either be placed under military custody or will be within the control of the armed forces. Any trial by the Court Martial¹⁵ can be held

13 The case of Trooper Williams for alleged wrongdoing in Iraq. His case was dismissed by his commanding officer, which, on the basis of the law at the time, excluded military jurisdiction over him. The case was referred to the Attorney General, who activated civilian criminal proceedings. These ultimately led to his acquittal. See <http://news.bbc.co.uk/1/hi/uk/4420051.stm> For the comment made by the Attorney General (Lord Goldsmith) to Parliament see *Hansard*, House of Lords, Vol 685, col 317 (Oct. 11, 2006) available at: www.publications.parliament.uk/pa/ld199697/ldhansrd/pdvn/lds06/text/61011-0011.htm.

14 It would cause practical problems for the civilian police to get to, and investigate, an alleged crime scene in battle conditions. It will often be difficult also for the Service police, a fact noted by *Al-Skeini v. United Kingdom*, Application No 55721/07, Judgment of the Grand Chamber, (Jul. 7, 2011), at para. 168.

15 Following a number of cases against the UK before the European Court of Human Rights on the

abroad (or within the UK) as could any summary disposal by the soldier's commanding officer. A sentence of imprisonment imposed by the Court Martial will be served in an ordinary civilian prison within the UK. A sentence of a period of detention (as opposed to imprisonment) can, if of sufficient length, be served at the Military Corrective Training Centre in England.¹⁶

1.09 Since it is most likely that any alleged LOAC violation will proceed through the armed forces jurisdiction route it is important to determine who can bring a charge against a particular soldier. This is the Service Prosecution Authority (headed by a civilian lawyer). The jurisdiction of the civilian Crown Prosecution Service is not ousted (in relation to a crime against English law) until the soldier has been convicted or acquitted.¹⁷ The law relating to double jeopardy has now been changed so that an acquittal before either the Court Martial or a civilian court would not be a bar to a further prosecution should new and compelling evidence become available.¹⁸

(b) *What acts are considered to be breaches of the law of armed conflict?*

1.10 For the purposes of English law acts which are considered to be breaches of LOAC are only relevant if they disclose a possible criminal offence or a breach of Service law. The avoidance of a possible breach of LOAC may also be relevant should a soldier raise the issue that the orders which he was given were unlawful commands in that, if carried out, the acts involved would amount to a breach of LOAC.¹⁹

ground that the court-martial (the predecessor of the Court Martial) was not an 'independent and impartial tribunal' (Article 6 of the Convention) substantial changes have been made since 1996 to make the Court Martial compliant with Article 6. It is generally considered now to be compliant.

16 The length of time is between 14 days and 2 years. For further information see www.army.mod.uk/agc/provost/2157.aspx.

17 Armed Forces Act 2006, s. 64, which stipulates that where a person has been convicted or acquitted before a Service court of an offence against the criminal law of England this will bar any subsequent civilian proceedings.

18 Criminal Justice Act 2003, s.78. It must also be in the public interest to order a re-trial.

19 The obligation to obey lawful commands is in the Armed Forces Act 2006, s. 12, in the sense that it is a Service offence to 'disobey a lawful command'.

1.11 Like Israel, international law is not part of English law unless a treaty, or part of a treaty, is transformed into English law. As a general principle, customary international law will be part of English law, providing it is not in conflict with an Act of the UK Parliament. One important exception to this is that an offence under customary international law will not become part of the law of England through the customary international law route. In *R v Jones*²⁰ the House of Lords²¹ held that the crime of aggression was a crime under customary international law but it could not, as a result, be a crime automatically under English law. The creation of new crimes under English criminal law should be within the sole control of Parliament. The effect of this decision is that a LOAC violation which is deemed to be so merely by virtue of customary international law is not a crime under English law. As a result the English criminal courts will have no jurisdiction. There is some wider scope in relation to the armed forces jurisdiction under the Armed Forces Act 2006 since a LOAC violation could be charged as a specific Service offence, such as ‘conduct to the prejudice of good order and Service discipline’.²² There is no Service offence of a breach of LOAC as such.

1.12 A soldier’s obligation is to obey *lawful* commands. Should a soldier be charged under Service law with failing to obey a lawful command it would be open to him to argue that the command was not lawful, ie that if carried out it would result in a breach of LOAC. Assuming he could establish as international law the relevant LOAC norm it would be relevant to his defence of failing to obey orders. In this case the status of that international law norm within English law would be irrelevant.

(c) *What breaches of the laws of armed conflict are considered to be war*

20 [2006] UKHL 16. It can be seen at: www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060329/jones-1.htm.

21 The House of Lords was the highest court of appeal in the UK. It has now been replaced by the Supreme Court.

22 Armed Forces Act 2006, s. 19.

crimes? Is the source of the designation as a 'war crime' found in legislation or case law? Please elaborate.

1.13 The term 'war crimes' as a general term is not legally significant in English law. That law creates certain offences under its criminal law which may be styled colloquially as 'war crimes'. In one instance, however, the term 'war crimes' is used as a general heading to encompass detailed crimes.²³ Some of the offences set out in (d) below do not require there to be an armed conflict in existence, although all could be charged in relation to acts committed during an armed conflict. For the relationship between international law generally and English law see para 1.11 above.

(d) What acts fall within any such legislation or case law?

1.14 Offences under English law which could be thought of as 'war crimes' are: grave breaches of the four Geneva Conventions 1949 or of Additional Protocol I, 1977;²⁴ misuse of the Red Cross and other protected emblems;²⁵ the offences set out in Articles 6, 7 and 8 of the Rome Statute of the International Criminal Court 1998;²⁶ the War Crimes Act 1991.²⁷ All of the above must have been committed during an armed conflict (or war) except for the crimes of genocide and crimes against humanity (although they normally occur during an armed conflict). The separate crimes of torture,²⁸ and the taking of hostages²⁹ can cover such acts during armed conflict as

23 The most important instance of this is the implementation of Article 8 (war crimes) of the Rome Statute 1998 by the International Criminal Court Act 2001.

24 Geneva Conventions Act 1957 (as amended) s. 1.

25 *Id.*, s. 6. This includes the Red Cross, Red Crescent, Red Lion and Sun, civil defence, signals of identification for medical units and transports, the Red Crystal (Additional Protocol III).

26 The International Criminal Court Act 2001, sections 51, 52.

27 This act was designed to give the courts jurisdiction under English law in respect of individuals who are alleged to have committed 'grave violations of the laws and customs of war under international law' in any territory occupied by Nazi Germany between 1939 and 1945. One conviction has been obtained under this Act, *R v. Sawoniuk* (1999, unreported). Sawoniuk had become a British citizen sometime after 1945. Given the age of possible defendants it is thought unlikely that any further prosecutions will be brought.

28 Criminal Justice Act 1988, s. 134.

29 Taking of Hostages Act 1982, which applies to 'a person whatever his nationality who in the UK or

well as ordinary civilian crimes. Since the soldier is subject to English criminal law he could be charged with any criminal offence, the *actus reus* and the *mens rea* of which are identical to that required for a breach of LOAC.³⁰ A breach of LOAC could also be charged as an offence under the Armed Forces Act 2006 (purely Service offences).³¹

1.15 It is also arguable that English law would treat as, for example, murder the killing of lawful combatant by a method or means which would be unlawful under LOAC. Thus, the killing of an enemy soldier by the use of a round which had been deliberately altered to produce an expanding bullet effect could amount to murder.³²

(e) *If breaches of the laws of armed conflict do not amount to war crimes, how are they dealt with?*

1.16 It is likely that any breach of LOAC, which would justify prosecution of a soldier, could be charged as one of the criminal offences set out in para 1.14 above or a Service offence under the Armed Forces Act 2006. In addition purely Service charges may be appropriate to try to ensure that a soldier does not subsequently breach LOAC. An example would be the refusal of a soldier to obey an order from his superior to attend LOAC training or the disobedience of an order prohibiting certain conduct which, if carried out, would breach LOAC.

1.17 A civilian, who is a British national or a resident of the UK, could be charged with an offence under sections 6, 7, or 8 of the Rome Statute 1998 as implemented by the International Criminal Court Act 2001, wherever

elsewhere [takes a hostage], s. 1.

30 An example would be the assault of a prisoner of war.

31 These offences are set out in sections 1-41 of the Armed forces Act 2006. None stipulate that they are only applicable to 'war' or to 'armed conflict'.

32 See generally, P. Rowe, *Murder and the Laws of War* (1991) 42 Northern Ireland Legal Quarterly 216.

committed.³³ Any person, whatever his nationality, could be charged with a grave breach of the Geneva Conventions 1949 or of Additional Protocol I, wherever committed.³⁴ Apart from these offences, along with murder, manslaughter and rape³⁵ all other criminal offences under UK law, committed by civilians, can only be committed within the jurisdiction of the relevant part of the UK.³⁶

(f) Is your country Party to the International Criminal Court statute? If so, how does that influence the national system of investigation and prosecution regarding alleged LOAC violations?

1.18 England, Wales and Northern Ireland became subject to the Rome Statute of the International Criminal Court by the International Criminal Court Act 2001.³⁷ The 2001 Act implements the crimes set out in Articles 6, 7 and 8 of the Rome Statute.³⁸ It also implements Article 28 of the Rome Statute (responsibility of commanders and other superiors). The modes of participation of crimes are also implemented in the 2001 Act in a form recognisable under English criminal law.³⁹ The 2001 Act does not implement any of the defences. The defences under the ordinary criminal law would be expected to apply to any particular case. Following the review conference in Kampala in 2010 of States parties to the Rome Statute a British Foreign and Commonwealth Minister told Parliament that ‘the UK will now consider whether

33 Sections 51, 52.

34 Geneva Conventions Act 1957 (as amended), s. 1.

35 Other offences may be specified by statute but are not relevant to discussion of breaches of LOAC.

36 Compare the jurisdiction over members of the armed forces whilst abroad set out in the Armed Forces Act 2006 to cover the commission of Service offences and criminal offences.

37 Scotland possesses its own legal system and it became subject to the Rome Statute, in broadly the same manner, by the International Criminal Court (Scotland) Act 2001.

38 In order to ensure consistency with any reservations made by the UK to previous treaties the International Criminal Court Act 2001 explicitly refers to the crimes under the Rome Statute being ‘construed subject to and in accordance with any relevant reservation or declaration made by the United Kingdom when ratifying any treaty or agreement relevant to the interpretation of those Articles,’ the 2001 Act, s. 50(4).

39 Section 55.

to ratify the amendment on the use of certain weaponry in a non-international armed conflict.’⁴⁰

1.19 The 2001 Act did not implement Article 17(1)(d). This provides that the International Criminal Court would not have jurisdiction if ‘the case is not of sufficient gravity to justify further action by the Court’. A British court martial would not have to consider this factor (apart from its normal assessment as to whether a prosecution should be brought against a Service man or woman). This position is logical since the purpose of that provision is to ensure that the International Criminal Court deals only with the serious cases passing this ‘gravity threshold’ whereas the aims of the Service jurisdiction include the maintenance of discipline within the armed forces.

1.20 The primary responsibility for investigating and bringing to trial those alleged to have committed a crime under the Rome Statute is that of a State possessing jurisdiction to do so.⁴¹ A State Party to the Rome Statute will need to show that it is able and willing to investigate and conduct a proper trial process if it does not want the International Criminal Court to take jurisdiction.⁴² The UK has shown, by the *Payne* case referred to in para 1.21, that it wishes to retain jurisdiction over members of its armed forces who are charged with an offence as set out in the Rome Statute. Whilst this jurisdiction could, in theory, be exercised by the civilian criminal justice system it is more likely, as discussed in para 1.22, that it will be exercised by military jurisdiction. Following a number of cases before the European Court of Human Rights it is now well settled that the British court martial is consistent with Article 6 of the European Convention on Human Rights 1950, ie the right to an independent and impartial tribunal.⁴³ For further

⁴⁰ *Hansard*, House of Lords, col 1061 (Jul. 22, 2010).

⁴¹ The Rome Statute 1998, Article 17. See also Article 12.

⁴² Article 17 of the Rome Statute.

⁴³ The fact that a court is not independent and impartial may be a factor in deciding whether the International Criminal Court has jurisdiction, see article 17(2)(c).

discussion of the European Court of Human Rights see para [1.29]ff below.

1.21 One successful prosecution has, to date, been brought under the International Criminal Court Act 2001. In *R v Payne and others* (2007)⁴⁴ A British soldier was charged with the war crime of ‘inhuman treatment’ to which he pleaded guilty.⁴⁵ Other defendants were charged but acquitted.⁴⁶ The case involved the death of a civilian (a Mr Baha Mousa) whilst held in detention by British armed forces in Iraq. There was evidence that he had been beaten severely by British soldiers prior to his death. The trial was held in England before a court-martial.⁴⁷ It has also led to proceedings being brought by the family of Mr Mousa before the English courts based upon an alleged breach of the Human Rights Act 1998 (discussed below at para 1.25)⁴⁸ and a public inquiry into the death of Mr Mousa (discussed below at para 1.33).⁴⁹

1.22 It is likely to be the case that all alleged breaches of the crimes set out in the Rome Statute and implemented into English law by the International Criminal Court Act 2001 will be investigated by the Service police. This is largely because alleged breaches are likely to occur overseas in areas of

44 The case is unreported but an account of it can be found in Nathan Rasiah, *The Court-Martial of Corporal Payne and others and the Future Landscape of International Criminal Justice*, 7 JICJ 177 (2009); Gerry Simpson, *The Death of Baha Mousa*, 8 MELB. J. INT’L L. 340 (2007).

45 The offence was drawn in terms of Article 8(2)(a)(ii) of the Rome Statute 1998 and s. 51(1), Schedule 8 of the International Criminal Court Act 2001. As a crime under English law it could be charged under military jurisdiction by s. 70 of the Army Act 1955 (the relevant act at the time, now the Armed Forces Act 2006, s.42). The full charge sheet can be found at: www.aspals.com/warcrimelqr.html (last accessed, May 25, 2011).

46 One of the acquitted defendants was the commanding officer of the regiment to which most of the soldiers concerned belonged. Issues of command responsibility are discussed in paras. 1.45-1.47 below.

47 Unusually, the trial judge was a civilian High Court judge sitting with a panel of Service officers. This role would normally be performed by a judge advocate, a civilian judge from the Office of the Judge Advocate General (a civilian appointment). In terms of the legal hierarchy in England a High Court judge is a higher judicial office than that of a judge advocate. There is no jury in a court martial although the panel of Service officers determine the facts and the verdict. The sentence is decided by the whole court-martial.

48 *R (Al-Skeini) v. Secretary of State for Defence* [2006] UKHL 26, available at: www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.htm.

49 The public hearing was concluded by Oct. 14, 2010. For the Baha Mousa Inquiry see www.bahamousainquiry.org. The Report was published on Sep. 8, 2011 and can be accessed at: www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110908/debtext/110908-0002.htm.

ongoing military activity, where it is often difficult for the civilian police to operate. The Protocol dealing with the relationship between civilian and Service criminal jurisdiction can be found in Section 2 of <http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2008/028-2008/>. It 'relates to arrangements solely in England and Wales and associated territorial waters.' Since most alleged LOAC violations by British soldiers will occur outside the UK it is likely that the Service police will have sole jurisdiction in the investigations. See also para 2.10 below.

(g) *Does your country treat human rights law as applicable in armed conflict? If so, on what basis and to what extent?*

1.23 Although the International Court of Justice has made some general statements concerning the applicability of human rights law during armed conflict⁵⁰ it is the European Convention on Human Rights 1950 which is of the most significance to the UK. A number of cases were brought against the UK concerning the operations of the armed forces and the civilian police in Northern Ireland during the 'troubles' there between 1969-1998.⁵¹ I have drawn attention to the fact that the UK Government did not consider the events occurring during that period as an 'armed conflict'. The principles developed by the resultant case law from the European Court of Human Rights can have some resonance to situations where the UK is involved in

50 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (2006) ICJ Reports, at para. 25; *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ, at para. 106; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (2005) ICJ, at para. 217.

51 In relation to acts committed by members of the armed forces whilst acting on duty see, for example, *McCann v. United Kingdom* (1995) 21 EHRR 97 (British soldiers shoot dead three IRA suspects, who they believed were about to detonate a bomb in Gibraltar). A number of prosecutions were brought against British soldiers in the criminal courts in Northern Ireland for on-duty acts. See, for example, *R v. Foxford* (1974) N I 181 (firing a rifle at night without proper aim, where members of the public had been constituted grave negligence); *R v. Fisher and Wright* Northern Ireland unreported judgment, Feb. 10, 1995 (shooting and killing a civilian when chasing after him; no honest belief by the two soldiers that they were justified in shooting at an unarmed man); *R v. Thain* [1985] N I 457 (trial judge concluded that the soldier had no honest belief that he was about to be fired on by a running man); *R v. Clegg* (1995) 1 AC 482 (soldier shot occupants of a car which refused to stop at a roadblock, convicted of murder. The Court stated that the force used was excessive and 'it made no difference that the person using it was a soldier or a police officer acting in the course of his duty').

an armed conflict, such as during occupation or during a non-international armed conflict). Although these events took place within the territory of the UK all other military operations in recent times have occurred outside the UK. As a result the reach of the European Convention has become crucial.

1.24 Article 1 of the Convention provides that the ‘High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms [set out in the Convention].’ The key phrase is ‘within their jurisdiction’. It can encompass obligations to secure Convention rights if an individual can be said to be ‘within... the jurisdiction’ of a State while the armed forces of a State are operating on foreign territory. There have been a considerable number of cases decided by the European Court of Human Rights on the meaning of ‘within their jurisdiction’.⁵² Where cases before the European Court of Human Rights are brought against a State other than the UK, courts in England must ‘take into account’ any decision of the Court by the Human Rights Act 1998.⁵³ Public authorities (which include the armed forces) would also be expected to comply with relevant rulings of the European Court of Human Rights.

1.25 The interpretation of ‘within their jurisdiction’ currently accepted within the UK follows the ruling of the House of Lords in *R (Al-Skeini) v Secretary of State for Defence*.⁵⁴ This case had been referred to the Grand Chamber of the European Court of Human Rights, which gave judgment

52 The lead case is *Bankovic v. Belgium [and the other NATO States]*, Application No 52207/99 (2001). The decision of the UK House of Lords in *R (Al-Skeini) v. Secretary of State for Defence* [2007] UKHL 26, available at: www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.htm. See also the Grand Chamber of the European Court of Human Rights in *Al-Skeini v. United Kingdom*, Application No 55721/07 (Jul. 7, 2011), at para. 131.

53 Section 2(1) of the 1998 Act. It is possible that a court in England might decide that the European Court of Human Rights was wrong about a particular point and issue a judgment inconsistent with it. For an example see the UK Supreme Court judgment in *R v. Horncastle* [2009] UKSC 14 and compare it with *Al-Khawaja v. United Kingdom*, Application No 26766/05; *Tahery v. United Kingdom*, Application No 22228/06. None of these cases involved members of the armed forces. A Joint Select Committee of both Houses of Parliament on Human Rights considers from time to time compliance by the UK with the judgments of the European Court of Human Rights. For the web page see www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee.

54 *R (Al-Skeini) v. Secretary of State for Defence* [2007] UKHL 26.

on 7 July 2011.⁵⁵ The case involved the death of Mr Mousa whilst in British custody (see para 1.21) and the death of five other Iraqi nationals killed during military operations by British soldiers whilst not under British (or any other) military custody. Whilst Mr Mousa's case was successful before the House of Lords the cases of the other five were not. This was because, unlike the other five cases, Mr Mousa was in British military custody and therefore 'within [the] jurisdiction' of the UK. This illustrates that, according to the House of Lords, it was insufficient for the UK merely to be in occupation of the territory of Iraq (at the time) to bring all the nationals of the occupied territory within the jurisdiction of the occupying State. The Grand Chamber of the European Court of Human Rights held, however, that all six applicants were within the jurisdiction of the UK. The UK had 'effective control of an area outside the national territory [South East Iraq]... the fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 [of the Convention] to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violation of those rights,' (see footnote 55 above).

55 Application No 55721/07, at para. 138. The Court also explained its decision as follows. 'Following the removal from power of the Ba'ath regime and until the accession of the Interim Government the UK (together with the US) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. In particular, the UK assumed authority and responsibility for the maintenance of security in S E Iraq. In these exceptional circumstances, the Court considers that the UK, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations [so as to bring them within the jurisdiction of the UK under Art 1 of the Convention],' at para. 149. The main allegation by the relatives of the first five applicants was that the UK had not complied with the procedural obligation to investigate an alleged breach of the right to life (as to which see para. 1.26). For the relationship between a decision of the European Court of Human Rights and decisions of the national courts see footnote 53 above. A UK Government Minister provided a written answer in Parliament in the following terms: 'the Government received the European Court of Human Rights Grand Chamber judgment on Al-Skeini and Al-Jedda (Jul. 7, 2011) are carefully considering the implications and next steps,' Hansard, House of Lords (Aug. 11, 2011), col. WA 372. Where a detainee, who was captured by British armed forces in Iraq, was subsequently transferred to the United States armed forces a writ of *habeas corpus* could not be issued to the US authorities to compel his release. This was because the Secretary of State for Foreign and Commonwealth Affairs in the UK did not have any power and control over the US authorities to compel them to hand over the detained person currently at the Bagram Airbase in Afghanistan, *Rahmatullah v. Secretary of State for Foreign Affairs* [2011] EWHC 2008 (Admin).

1.26 The effect of a finding that a foreign national is within the jurisdiction of the UK when its armed forces are acting overseas means that all the Convention rights are owed to him. Just like a person in England who claims that a public authority (e.g. the armed forces) in England has infringed his Convention rights the foreign national has the same rights of action before the courts in England. This will mean that in the case of death at the hands of the British military authorities or where there is a prima facie case that the individual has been subjected to torture, inhuman or degrading treatment, an investigation must be held. This investigation must comply with the obligations upon the State set down in numerous cases before the European Court of Human Rights. Thus the investigation must be ‘independent and impartial in law and in practice’.⁵⁶ It must also ‘effective in the sense that it is capable of leading to the identification and punishment of those responsible... there is a requirement of promptness and reasonable expedition... [with] a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of scrutiny may well vary from case to case. In all cases the next of kin of the victim [this is referring to an investigation following a death in the custody of State agents] must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.’⁵⁷ This obligation to investigate may be difficult where an armed conflict or an insurgency is taking place in occupied territory. In *Al-Skeini v United Kingdom* 2011 (see footnote 55 above) which considered the situation in S E Iraq in 2003 where the UK, as an occupying power, faced the ‘practical problems involved [in] the breakdown in the civil infrastructure, leading *inter alia* to shortages of pathologists and facilities for autopsies... and the dangers inherent in any activity in Iraq at the time.’ Nevertheless, the Court considered that ‘the procedural duty under Article 2 must be applied realistically, to take account of specific problems faced by investigators,’ (para 168) even where an armed conflict was taking place (para 164). This

⁵⁶ *Ramsahai v. The Netherlands*, Application No 5239/19 (May 15, 2009); at para. 321.

⁵⁷ *Israilova v. Russia*, Application No 35079/04 (Oct. 28, 2010).

will mean that additional responsibilities will fall upon the armed forces to preserve the scene of an alleged breach of Article 2 (right to life) or Article 3 (torture, inhuman or degrading treatment) for the purpose of the investigation required under these Articles.

1.27 Where a soldier is participating in military operations abroad he will retain his liability to the criminal law of England and to Service law. If he kills a civilian who was immediately before the shooting ‘within the jurisdiction’ of the UK an investigation of the type referred to in para 1.26 above will be required. If the civilian is not within the jurisdiction of the UK a judgment will be made as to whether he has complied with his rules of engagement. If so, it is unlikely that he will be investigated further.⁵⁸ In terms of the obligation to hold an investigation where a person is killed or has been subjected to torture, inhuman or degrading treatment the contrast between being within the jurisdiction of the UK and not is stark. It is, perhaps, not surprising to see strong arguments from those acting on behalf of civilians killed or subjected to torture, inhuman or degrading treatment by British soldiers to try to widen the concept of ‘within jurisdiction’ in order to impose the obligation to conduct an investigation of the type demanded by the European Court of Human Rights.⁵⁹

1.28 The European Convention on Human Rights can apply also to the armed forces of a State Party to the Convention in much the same way as

⁵⁸ This was the situation in respect to five of the claimants in *R (Al-Skeini) v. Secretary of State for Defence*. See the judgment of the Court of Appeal in that case [2005] EWCA Civ 1609, paras. 23-27, available at: www.bailii.org/ew/cases/EWCA/Civ/2005/1609.html. On the facts of that case see now *Al-Skeini v. United Kingdom*, Application No 55721/07, where the five applicants were held to be within the jurisdiction of the UK. The rules of engagement (often in the form of a card in the possession of soldiers) are designed to keep the soldier within the applicable law, although they are not law by themselves, *R v. Clegg* (1995) 1 AC 482.

⁵⁹ This is, in reality, the aim behind the application to the European Court of Human Rights in the *Al-Skeini* case and before the English courts in cases such as *The Queen (on the application of i Mousa) v. Secretary of State for Defence* [2011] EWHC civ 1334 (discussed below). The obligation to carry out an ‘Article 2 investigation’ (see para. 1.26 above) creates a much more rigorous obligation on the State (in effect its armed forces) than where it is not required. See the Grand Chamber’s view as to the inadequacy for Article 2 purposes of the investigations carried out in the cases of the first applicants in *Al-Skeini* at para. 172 of its Judgment.

discussed above. Thus, members of the armed forces within the UK are owed all Convention rights (just like anyone else, although subject to the characteristics of military life⁶⁰) and when serving abroad they are owed these rights only when they are ‘within [the] jurisdiction’ of the UK. This term has been interpreted by the English courts in this context in a way similar to the position of a civilian in foreign territory. The soldier will be within jurisdiction when he is on a military base. This means that he will not be owed Convention rights, such as the right to life, when he is taking part in military operations overseas and off base.⁶¹ There have been various occasions where it has been argued that the UK has failed to provide soldiers with the necessary kit or equipment to safeguard their lives.⁶² Such allegations can be explored at a coroner’s inquest in England into the death of a UK Serviceman or woman killed abroad,⁶³ at a civil court hearing for damages brought by the next-of-kin,⁶⁴ in Parliament,⁶⁵ or before a public inquiry (if one is established).

60 *Engel v. The Netherlands*, Application No 5100/71 (Jun. 8, 1976), at para. 54.

61 *R (on the application of Smith) (FC) v. Secretary of State for Defence* [2010] UKSC 29, available at: www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0103_Judgment.pdf. This decision may now be considered inconsistent with the Grand Chamber of the European Court of Human Rights in *Al-Skeini v. United Kingdom*, Application No 55721/07 (Jul. 7, 2011) where a wider view was taken of ‘within jurisdiction’ under Article 1 of the Convention than that taken by the House of Lords in *R (Al-Skeini) v. Secretary of State for Defence* [2007] UKHL 26. The UK Supreme Court in *Smith* relied upon its predecessor court in *Al-Skeini* to interpret ‘within jurisdiction’ for the purpose of determining when a British soldier could be owed Convention rights whilst taking part in military operations abroad. For the wider view of ‘within jurisdiction’ decided upon by the Grand Chamber of the European Court of Human Rights in *Al-Skeini v. United Kingdom* (2011) see para. 1.25 above.

62 The obligation in Article 2 of the Convention encompasses a failure on the part of public authorities to protect the right to life and negligence in the protection of life along with a prohibition on taking life outside the justifications provided in that Article.

63 “A total of 453 inquests have been held into the deaths of service personnel who have lost their lives in Iraq or Afghanistan”, The Minister for the Armed Forces, *Hansard*, House of Commons, col 45WS (May 12, 2011), available at: www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110512/wmstext/110512m0001.htm#11051236000040.

64 In *Smith and others v. Ministry of Defence* [2011] EWHC 1676 (QBD) claims for damages were brought by the next of kin of British soldiers killed in Iraq by improvised explosive devices whilst travelling in Army ‘Snatch’ Land Rovers (lightly armoured vehicles) and in relation to a ‘friendly-fire’ incident involving two British tanks. Owen J (in the High Court) concluded that there was ‘no basis for holding as a matter of principle that claims for personal injury or death of members of the armed forces are not justiciable simply because the damage was incurred in combat, para. 107. It would all depend on the facts. In *Mulcahy v. Ministry of Defence* [1996] QB 732 the Court of Appeal held that one soldier injured by another whilst an artillery piece was fired during the Gulf War 1991 could not sue since “one soldier did not owe a fellow soldier a duty of care in tort when engaging the enemy in battle conditions in the course of hostilities”.

65 Allegations have been made in Parliament that soldiers, for instance, have not been supplied with body armour and that transport aircraft have not been fitted with explosion suppressant foam.

(h) *Is your country subject to national/regional human rights tribunals or other fora which could investigate alleged LOAC violations (e.g. European Court of Human Rights)? If so, please briefly describe any key cases in that regard.*

1.29 The UK has been a Party to the European Convention on Human Rights since 1953. As explained in para 1.11 above a treaty has no effect in English law unless it is specifically implemented by national legislation. Following the passage of the Human Rights Act 1998 (which came into force in 2000) the Convention rights⁶⁶ in the 1950 Convention became a part of English law. It applies to public authorities, which clearly includes the armed forces. The Act provides that ‘it is unlawful for a public authority to act in a way which is incompatible with a Convention right.’⁶⁷ The effect of this is that Convention rights can be enforced directly within the courts of England and the armed forces must act in a way at all times consistent with Convention rights when its activities affect a person ‘within the jurisdiction’ of the UK.⁶⁸

1.30 The European Court of Human Rights is not an investigating body. As a result of the Human Rights Act investigations into alleged human rights breaches will be conducted by UK authorities applying relevant Convention rights. Once all domestic remedies have been exhausted within the English legal system an applicant may bring a case before the European Court of Human Rights against the UK.

1.31 Should a case involving an alleged breach of LOAC be brought before the European Court of Human Rights this will not be the primary issue

66 The Convention rights are those contained in Article 2-12 and 14 of the Convention; Articles 1-3 of the First Protocol and Articles 1, 2 of the Sixth Protocol, see the Human Rights Act 1998, s.1.

67 Section 6. Prior to the Human Rights Act 1998 coming into force (2000) in England an applicant had to bring his or her case directly to the European Court of Human Rights in Strasbourg. After 2000 the courts can enforce the Convention rights directly in English law with application to the European Court of Human Rights only if all domestic remedies have been exhausted in English law.

68 For the meaning of the phrase ‘within the jurisdiction’ see paras. 1.24-1.25.

before the Court. It will, instead, be whether the applicant's rights under the Convention have been breached by the State. This may, of course, be shown by the breach of LOAC or by other activities of the State. In *McCann v United Kingdom*,⁶⁹ British soldiers shot and killed three alleged IRA suspects, whom they believed were intent on exploding a car bomb during the course of a military parade in Gibraltar. The soldiers believed also that the suspects had the means to cause the explosion remotely by a hand held, or other bodily, trigger mechanism. At a coroner's inquest in Gibraltar concerned with the death of the three suspects the soldiers were found to have been justified under national law for their actions. When the relatives of the suspects made an application to the European Court of Human Rights that Court held that the UK had denied the three suspects their Convention right to life (under Article 2) since Army officers, who were not involved in the actual shooting, had planned the whole operation and they could reasonably have had the three suspects arrested when they passed from Spain into Gibraltar.

1.32 Only one case involving the UK has been brought before the European Court of Human Rights in which a breach of LOAC has been a significant factor.⁷⁰ This is *Al-Skeini v United Kingdom*, which had been referred to the Grand Chamber of the Court (see para 1.25 above).⁷¹ Other cases have involved the UK as a named respondent but only where applications have been brought against members of NATO (or in respect of military operations in which the UK has been involved).⁷² Finally, the UK is bound

69 (1995) 21 EHRR 97.

70 *McCann v. United Kingdom* has been excluded since it was never accepted by the UK or by the European court of Human Rights that LOAC was applicable. The law applied was purely national law.

71 In *Al-Saadoon and Mufdhi v. United Kingdom*, Application No 61498/08 (Mar. 2, 2010) the issue was whether two Iraqi individuals, detained by British military authorities in Iraq at the request of the High Criminal Court in Iraq were within the jurisdiction of the UK when they were handed over to the Iraqi authorities. The Court of Appeal in England and the European Court of Human Rights took opposite positions on this issue. In this case a significant fact was that the two Iraqi nationals were suspected of killing British prisoners of war in Iraq. If true, this would clearly amount to a breach of LOAC on the part of the two Iraqi individuals and no breach of LOAC on the part of British armed forces.

72 These are the following cases: *Bankovic v. Belgium [and other NATO States]* Application No 52207/99, Admissibility Decision (Dec. 12, 2001); *Milosevic v. The Netherlands*, Application No 77631/01,

by its own law to take into account the decisions of the European Court of Human Rights, whichever State is the respondent.⁷³

(i) *What other options are available for investigating possible LOAC violations (e.g. public inquiries, parliamentary hearings, special prosecutors)?*

1.33 The immediate problem facing the Government or a Parliamentary body considering holding a public inquiry or a Parliamentary hearing into possible LOAC violations is to avoid any action which could potentially prejudice the fair trial of anyone accused of such a violation. The practice has been to wait until the conclusion of any criminal proceedings before commencing a public inquiry. Thus, following the death of Mr Baha Mousa whilst under detention in a British military base in Iraq a number of soldiers, of various ranks, were tried by court-martial in England.⁷⁴ Once these proceedings had been concluded the Government established a public inquiry, the Baha Mousa Inquiry. The Report of this Inquiry was published in September 2011.⁷⁵ It is discussed in para 4.28 below.

1.34 Other allegations arose which suggested that Iraqi detainees had been killed while at a British military base in Iraq. It was clear that, if true, the detainees would have been within the jurisdiction of the UK.⁷⁶ As a result the UK owed them the European Convention right to life and any death in such circumstances would have to be investigated by the UK

Admissibility Decision (Mar. 19, 2002); *Sadaam Hussein v. Albania and others*, Application No 23276/04, Admissibility Decision (Mar. 14, 2006).

73 Technically, the obligation in the Human Rights Act 1998, s.2 to do so applies to 'courts or tribunals.' Given, however that the armed forces, as a public authority, are required to act lawfully in terms of Convention rights they must act consistently with those rights as declared by the European Court of Human Rights or by a court in England.

74 *R v. Payne and others*, referred to in para. 1.21 above.

75 See www.bahamousainquiry.org.

76 These are the facts surrounding what has become the Al-Sweady Inquiry. See *R (on the application of Al-Sweady) v. Secretary of State for Defence* [2009] EWHC 2387 (Admin). Further details on this public inquiry are at para. 1.35. For the wider meaning given by the Grand Chamber of the European Court of Human Rights (Jul. 7, 2011) to 'within jurisdiction', see *Al-Skeini v. United Kingdom*, Application No 55721/07, discussed below at footnote 202.

authorities. On behalf of a number of Iraqi detainees a case was brought before the High Court in London seeking judicial review of a decision by the UK Government not to hold a public inquiry into alleged systemic abuse of detainees in Iraq. The Court decided that the investigation of allegations against a number of British soldiers was sufficiently independent of the Army chain of command to enable them, at this stage, to run their course, before considering whether a public inquiry into these allegations was necessary. The Court of Appeal disagreed, on the facts, holding that the proposed investigation set up by the Ministry of Defence to investigate was not sufficiently independent of the Royal Military Police.⁷⁷

1.35 A public inquiry has recently begun into incidents surrounding what became known as the ‘Battle of Danny Boy’ in Iraq. The issues to be dealt with by the public inquiry can be found at: www.alsweadyinquiry.org/linkedfiles/alsweadyinquiry/key_documents/100917alsweadyinquiry-amendedlistofissues.pdf.

1.36 There is no bar to the armed forces establishing its own inquiry to determine, for instance, whether any lessons could be learned from a series of prosecutions of soldiers. The British Army commissioned a Report by Brigadier Aitken, *An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004* (Ministry of Defence, 2008) for this purpose. This Report can be found at: www.mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf. Its very detailed recommendations to prevent abuse are at pp 26-36 of the Report.

1.37 There is no provision in English law for the appointment of special prosecutors. Any prosecutions for alleged breaches of LOAC can only be brought under the civilian jurisdiction by the Crown Prosecution Service or under Service jurisdiction by the Director of Service Prosecutions. In

⁷⁷ *The Queen (on the application of Ali Zaki Mousa) v. Secretary of State for Defence* [2010] EWHC 3304 (Admin); on appeal to the Court of Appeal, [2011] EWCA Civ 1334, discussed further at para. 2.16.

addition, it is technically possible for an individual to bring a private prosecution, but a trial has never taken place in respect of an alleged LOAC violation,⁷⁸ although attempts have been made to carry out arrests of named individuals within the UK with a view to bringing a private prosecution.

(j) What is the basis for criminal jurisdiction over breaches of the laws of armed conflict in your country (territorially, nationality, passive personality, protective)?

1.38 The general principle is that criminal jurisdiction applies only to the territory of the UK. As shown in paras 1.02 and 1.06 above, a member of the armed forces is subject to Service law (which includes all criminal offences of the law of England) wherever he or she is deployed in the world. A civilian will also be subject to a very limited number of offences if they are committed outside the jurisdiction.⁷⁹ A non-British national or resident may also be liable for a limited number of offences committed extra-territorially. There are some offences which can be committed extra-territorially by a person of any nationality.⁸⁰

1.39 UK Service jurisdiction applies, broadly, only to members of the British armed forces or civilians performing certain supporting roles abroad. It does not apply to anyone else. Thus, it will not apply to members of the armed forces of another State, or to civilians who take an active part in hostilities or, indeed, to anyone else, whether they harm a UK national or not.⁸¹

78 In practical terms any such individual would be likely to be a foreign national since, as discussed in para. 1.01 above, all modern armed conflicts involving the armed forces of the UK have been conducted abroad.

79 The most significant example is the International Criminal Court Act 2001, which makes it an offence for a British national, resident or a person subject to service law to commit any of the crimes set out in Article 6 (genocide), Article 7 (crimes against humanity) or Article 8 (war crimes) wherever the act takes place. If one of these crimes is committed in the UK any person (of whatever nationality or resident status) could be placed on trial for such an offence.

80 This would include grave breaches of the Geneva Conventions 1949 or of Additional Protocol I, 1977. See the Geneva Conventions Act 1957 (as amended), s.1. See para. 1.42.

81 The position relating to the trial of those who have been captured and have become prisoners of

(k) Does the national war crimes legislation jurisdiction extend to members of the military? If so, under what circumstances?

1.40 As shown above (see para 1.02) the whole of the criminal law of England (whether styled as relating to ‘war crimes’ or not) applies to members of the UK armed forces whether they are deployed at home or overseas.⁸² In addition, they will be subject to purely Service law offences⁸³ in the same circumstances.

(l) Is there universal jurisdiction and how is such jurisdiction exercised?

1.41 It is important to be clear as to the meaning of ‘universal jurisdiction’. I take this to mean a jurisdiction which could be exercised by the courts of England in respect of a crime against the criminal law of England committed by a foreign national (i.e. not a British national or a British resident) outside the territorial limits of the UK. Other forms of jurisdiction are discussed in response to sub-heading (j) above. For a number of these offences the consent of the Attorney General must be sought before a prosecution is brought. The relationship between the separate offices of the Attorney General and the Director of Public Prosecutions is discussed at para 3.34 below.

1.42 Within this meaning, there are very few offences, relevant to LOAC, over which universal jurisdiction could be exercised. The most significant is, however, a grave breach of the Geneva Conventions 1949 or of Additional

war within the meaning of Geneva Convention III, 1949 and Additional Protocol 1, 1977 will be modernised following the passing of the Armed Forces Act 2011 to be able to use the procedures of the 2006 Act should prisoners of war commit an offence during captivity. The current law enables a prisoner of war to be tried by a separate procedure, the prisoner of war court-martial. This will be abolished and prisoners of war will fit in to the procedures of the 2006 Act when the necessary regulations have been made. Other problems of jurisdiction may arise where a foreign spy is captured (entitled to a trial) or over the legal authority to detain alleged criminals detained by British armed forces engaged on military operations overseas.

82 Armed Forces Act 2006, s.42.

83 These are offences contained in the Armed Forces Act which are not criminal offences against the law of England.

Protocol I, 1977.⁸⁴ No prosecution of foreign nationals has ever been brought for such an offence, although attempts have been made by private individuals to arrest named individuals for an alleged grave breach of the Geneva Conventions 1949.⁸⁵

1.43 A further example is the War Crimes Act 1991. This Act applies to anyone (whatever their nationality at the time) who committed an offence which ‘constituted a violation of the laws and customs of war’⁸⁶ in Germany or any territory occupied by Germany between 1939 and 1945 but who subsequently became a British subject.⁸⁷ Another is the Taking of Hostages Act 1982 (which could apply during an armed conflict) which applies to a person whatever his nationality and whether the hostage is taken in the UK or elsewhere. More limited jurisdiction can be found in the following Acts. The Cluster Munitions (Prohibitions) Act 2010 applies to conduct within the UK or elsewhere but only makes it an offence for UK nationals to commit. The Chemical Weapons Act 1996 and the Landmines Act 1998 are similar in this regard.

1.44 Whilst technically not an example of ‘universal jurisdiction’ the courts in England will have jurisdiction over a British national or resident who is alleged to have committed a crime under the International Criminal Court Act 2001 (genocide, crimes against humanity, war crimes) wherever committed.

84 The Geneva Conventions Act 1957 (as amended), s.1. Under the current law a prisoner of war could be tried by a prisoner of war court-martial for a grave breach of the Geneva Conventions 1949 committed prior to capture. Prisoner of War (Discipline) Regulations 1958, regulation 7. At the date of writing the Armed Forces Bill 2011, Clause 23 imposes a requirement on the Secretary of State to issue a Royal Warrant to enable prisoners of war to be dealt with under the Armed Forces Act 2006 for any offences committed after capture.

85 In 2010 the Ministry of Justice in England proposed that the right to bring a private prosecution against a non-UK citizen should be stopped and replaced by a decision to be made only by the Crown Prosecution Service. If enacted this will prevent a private citizen seeking an arrest warrant from a magistrate to arrest (or to issue a summons against) a foreign national within the UK who is alleged to have committed a grave breach of the Geneva Conventions 1949 or of Additional Protocol (under the Geneva Conventions Act 1957).

86 Section 1(1).

87 The crime charged under English law was murder or manslaughter. For discussion of the conviction of Sawoniuk in London under this Act see footnote 27 above.

(m) Does your country deal with the issue of “command responsibility”? If so, how?

1.45 ‘Command responsibility’ is dealt with in a number of ways under the law of England. The term ‘command responsibility’ is to be distinguished from the direct participation in a crime against English law (or Service law) by a superior in rank from any other participant in that crime. Thus, if a commissioned officer orders a private soldier to kill a prisoner of war the officer would be liable as a secondary party to the crime of murder (or a grave breach of Geneva Convention, III, 1949) committed by the private soldier as the principal offender. The term ‘command responsibility’ is taken to refer to a person in command of others who, whilst not a direct participant in the crime committed by his or her subordinate(s) bears some criminal responsibility for that act. The principle of command responsibility in this meaning of the term was developed in the *General Yamashita* case (1946). It currently finds expression in Articles 86 and 87 of Additional Protocol I (1977) but more particularly in Article 28 of the Rome Statute of the International Criminal Court 1998. It also covers other superiors, other than commanders.

1.46 Article 28 of the Rome Statute has been implemented, in its entirety, into English law by the International Criminal Court Act 2001, section 65. The effect of this is that a military commander could be prosecuted under this section where a crime under the International Criminal Court Act (genocide, crimes against humanity or war crimes) is committed by a subordinate and the responsibility of the commander is based on his or her knowledge or failure to act as stipulated in the section. Civilian jurisdiction could be exercised since the 2001 Act applies to a British national wherever a crime under the Act is committed or under Service jurisdiction by way of the Armed Forces Act 2006. A civilian superior could only be prosecuted under civilian jurisdiction since he or she is not subject to Service law. It is of interest to note that the International

Criminal Court Act 2001 provides that a commander or other superior would be charged as a secondary party to the offence committed by the principal offender, despite the strict position under the criminal law that he or she would not be a participant to the offence committed by the principal offender.⁸⁸

1.47 Any failure of command to supervise subordinates could also result in a charge under Service law. The most likely charge would be drawn under the Armed Forces Act 2006, s.15(1) which provides that ‘if, without reasonable excuse, he... (c) fails to perform any duty’ or ‘(2)...if he performs any duty negligently.’ In *R v Payne and others* (see para 1.21 above) the commanding officer, another officer and a non-commissioned officer were each charged separately with negligently performing a duty in a case involving the death of an Iraqi civilian who died whilst under British Army custody in Iraq.⁸⁹ Each was subsequently acquitted by the court-martial.

(n) *Does your country deal with the “defence of superior orders”? If so, how?*

1.48 The UK did not implement Article 33 of the Rome Statute of the International Criminal Court into the International Criminal Court Act 2001. There is no statutory provision dealing with superior orders as a defence. The common law position will continue to apply to all criminal offences against the law of England. This provides that superior orders is not a defence to any crime, whether manifestly unlawful or otherwise. There is nothing to prevent the fact that a person was ordered to commit an offence by a superior being taken into account in mitigation of punishment following a finding of guilt. It is likely that the same result would follow if a member of the armed forces was convicted by the court

⁸⁸ International Criminal Court Act 2001, s. 65(4).

⁸⁹ The charge was based on the law at the time, the Army Act 1955, s.29A(b).

martial of an offence under Service law since the soldier has a duty to obey *lawful* commands.⁹⁰

1.49 Closely allied to the issue of superior orders is the refusal by a soldier to take part in military activities on the ground that the superior order to do so would be unlawful under international law. There are two reported cases where a member of the armed forces refused to obey a command to return to service. Both cases involved the UK's involvement in the armed conflict in Iraq after 2003. These were the cases of *Khan v Royal Air Force Summary Appeal Court*⁹¹(where a reserve force airman claimed that as a Muslim 'the impending invasion of Iraq was wrong and to be in any way a participant in it would be contrary to his religion' he was found to have no defence on a charge of being absent without leave). In *R v Kendall-Smith*⁹² a Service medical officer refused to return to Iraq for a subsequent tour. He was convicted by court-martial of refusing to obey a lawful command and sentenced to a term of imprisonment.

90 Armed Forces Act 2006, s.12, where a person subject to Service Law commits an offence under that law if he 'disobeys a lawful command; and he intends to disobey, or is reckless as to whether he disobeys, the command.' The notes to S.34 of the Army Act 1955 in the *Manual of Military Law* (12th ed., as amended) advise that *lawful* means that the order 'must not be contrary to English law or international law'. The whole of the 1955 Act has now been repealed and replaced by the Armed Forces Act 2006. It is thought likely that these notes still hold good in respect to the current provision (s.12) in the 2006 Act. The effect of this is that a soldier will have to decide whether the command (order) is lawful or not when he is given it. If the order was lawful under English law and international law he must obey it or commit an offence under the Armed Forces act 2006, s.12. If the order was unlawful under English law or under international law he must not obey it. If he does he will commit an offence under English law or if the breach of international law is an offence under Service law, that law and he cannot claim any 'defence' of superior orders. Lawfulness or unlawfulness of an order is an objective criterion. It is not sufficient that he *believes* the order to be unlawful. It must actually be unlawful. This is a serious risk for any soldier to take.

91 [2004] EWHC 2230 (Admin).

92 Unreported but discussed in *R (Gentle and another) v. Prime Minister and Others* [2008] UKHL 20, at para. 50.

2. CIVILIAN JUSTICE SYSTEM

(a) *What is the structure of the civilian system of justice and the role of civilian courts, Attorney General/or similar prosecution authority and civilian police both in general, and specifically regarding the investigation and prosecution of alleged LOAC violations?*

2.01 Allegations of criminal conduct under the civilian criminal justice system are divided into three categories, non-indictable, indictable or either way offences. A non-indictable offence covers the least serious of the criminal offences and is triable solely in the magistrates' court in England. The magistrates are normally non-legally qualified individuals selected for such a part-time position. They sit with a legally qualified 'clerk', whose role is merely to advise them on legal (including evidential) issues. It is unlikely that any alleged LOAC violations would give rise to a charge for a non-indictable offence. These courts will not be considered further in this Report. An indictable offence is reserved for the most serious of all crimes and it will be tried by a professional judge and a lay jury of 12 citizens chosen randomly. This is styled 'trial by the Crown Court'. All LOAC offences under English law will be tried in this format. An either way offence comprises a list of offences which, generally at the option of the accused, can be tried either in the magistrates' court or before a professional judge and jury in the Crown Court. Crown Courts sit in most large cities or towns in England.

2.02 An appeal from the verdict of the jury at the Crown Court will go to the Court of Appeal Criminal Division⁹³ on a point of law. Only the convicted individual may appeal; the prosecution cannot do so.⁹⁴ That Court

93 There is only one Court of Appeal Criminal Division, which generally sits in London. In this way it can be contrasted with the Crown Courts, which sit in most large towns or cities in England.

94 Where the accused has been acquitted by the jury the prosecution can refer a case to the Court of Appeal Criminal Division for a ruling solely to clarify a point of law. Any decision of the Court of Appeal Criminal Division on a reference of this type cannot affect the trial of the individual who has been acquitted.

will comprise three judges sitting alone.⁹⁵ They can quash the conviction, affirm it (in whole or in part) and/or substitute the sentence they think appropriate. Further appeal on a point of law of ‘general public importance’ will go to the Supreme Court (previously styled the House of Lords).

2.03 This Report will concentrate on indictable offences. In England there are a number of separate police forces, broadly but not wholly, based on counties. There is not one national police force.⁹⁶ Investigations of an alleged crime will normally be conducted by the police force in the area where the alleged crime took place. The chief constable (the head of the individual police force) is responsible for all operational matters within his or her force and is, in consequence, independent of the Government. All police forces are inspected by Her Majesty’s Inspectorate of Police. The police have the power to arrest a person without a court order if a police officer has ‘reasonable grounds for suspecting that an offence has been committed’.⁹⁷ A person arrested must be brought before a court within 96 hours after his arrest.⁹⁸ In the meantime he or she may be granted ‘police bail’ or be detained in custody until the court appearance. It will be for the magistrates’ court to decide whether to grant bail⁹⁹ to the suspect or to remand him or her in custody until the next court appearance or the trial itself. After the police have started their investigation they will refer that case to the Crown Prosecution Service, which body will make the decision on whether to prosecute and, if so, on what charge(s).

2.04 The Crown Prosecution Service (CPS) is headed by the Director of Public Prosecutions, who is appointed by the Attorney General, to whom

95 The Court Martial Appeal Court (see para. 3.36 below) comprises the same judges who are eligible to sit in the Court of Appeal Criminal Division.

96 Technically, there are two: the British Transport Police; the Ministry of Defence Police. The Ministry of Defence Police jurisdiction relates to land, vehicles etc which are under the control of the Ministry of Defence, Ministry of Defence Police Act 1987. They are to be distinguished from the Service police.

97 Police and Criminal Evidence Act 1984.

98 *Id.*

99 An appeal against the decision whether to grant bail is made to the High Court.

he reports.¹⁰⁰ The CPS is wholly independent of Government, although the Attorney General is responsible to Parliament for its overall performance.

(b) If there is an Attorney General or similar individual in your country, what is his or her role, in particular with regard to incidents in which there might be possible LOAC issues or a possible LOAC violation? Advice on legal matters? Supervision over subordinate prosecutors? Supervision over investigative or police personnel? Authority to determine whether to charge? Any other relevant authority?

2.05 It is likely that any allegations of LOAC violations would be against members of the armed forces, in which case the investigations would be carried out by the Service police and referred to the Director of Service Prosecutions (about which see para 3.32 below). The Attorney General would not normally be involved, although this may happen in an unusual case as the Attorney General has a general supervision power over the military justice system (see para 3.34 below). Should a public inquiry be established any grant of immunity to witnesses will be with the agreement of the Director of Public Prosecutions.¹⁰¹ In the unlikely event that an allegation of a LOAC violation is made against a civilian it would be investigated in a way similar for any indictable offence, as to which see para 2.01 above.

2.06 It will be seen in Heading 3 below (Military Justice System) that the Services have their own legal departments for advice on LOAC matters. In addition, there are Ministry of Defence lawyers and those in the Foreign and Commonwealth Office. The primary source of legal advice to the armed forces on LOAC matters would be the Service legal branches. As explained above the Attorney General possesses a general supervisory role over legal

¹⁰⁰ The Prosecution of Offences Act 1985, sections 2, 9. The 1985 Act established the Crown Prosecution Service.

¹⁰¹ For an example in relation to the Al Sweady public inquiry see para. 1.35 above.

matters affecting the armed forces but it unlikely that such an individual would be involved in the vast majority of all issues/cases.

2.07 Decisions on whether to charge an individual will be made solely by the Director of Service Prosecutions (for a person subject to Service law or a civilian subject to Service discipline-as to which see paras 3.13 and 3.21 below) or by the Director of Public Prosecutions in respect of a civilian or even a member of the armed forces if the decision is that he or she is to be tried under the civilian, rather than the military, justice system.

(c) Do the civilian investigative authorities, including criminal investigators, act independently or are they subject to the direction of the prosecutor or other actors in the judicial system?

2.08 The civilian police act independently on all operational matters (see para 2.03 above) although they may be guided by the Crown Prosecution Service as to the evidence required for a successful prosecution. In the English system of criminal justice judges do not play any role in the investigation process, by way of directing particular investigatory steps or otherwise. During the course of a trial it is very rare for a judge to call a witness.¹⁰² All witnesses will be called by the prosecution or the defence.

2.09 A decision by the Crown Prosecution Service not to prosecute an individual could, however, be the subject of judicial review proceedings in the High Court. Such a challenge to a decision of the Crown Prosecution Service is rare. Once a prosecution is brought and the trial has commenced the judge can order the jury to bring in a verdict of not guilty on one or more charges if the trial judge takes the view that no reasonable jury could convict on the evidence presented by the prosecution or where the

¹⁰² A judge has discretion to call a witness 'although it has been stressed that there must be a good reason for such an interference with the adversarial process,' Cross and Tapper, *On Evidence* 293 (12th ed., 2010).

prosecution subsequently decides not to offer any evidence against an accused on one or more charges.

2.10 In relation to war crimes, crimes against humanity, genocide or torture ‘the Metropolitan Police Counter Terrorism Command’ and the Crown Prosecution Service have agreed a Protocol: War Crimes/Crimes against Humanity Referral Guidelines, which is available at: www.cps.gov.uk/publications/agencies/war_crimes.html.

(d) What, if any, safeguards are in place (under law, regulation, policy or practice) regarding the independence and impartiality of the various actors in the civilian justice system that might be involved in investigating and/or prosecuting possible LOAC violations? Is there any relevant case law?

2.11 The independence of the judges is set out in the Constitutional Reform Act 2005 which lays down that ‘ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.’¹⁰³ A judge could withdraw from a particular case if he or she believes there are circumstances in which a reasonable person could consider him or her to lack impartiality, e.g. that an individual judge knows the accused or a prosecution witness.

2.12 The independence of the Crown Prosecution Service is set out the Director of Public Prosecution’s Statement of Independence which declared that ‘These characteristics of fairness, impartiality and independence are central to the independence of the prosecution and our independence is of fundamental constitutional importance.’¹⁰⁴

2.13 The independence of the police is discussed at paras 2.03, 2.08 above.

¹⁰³ Section 3(5).

¹⁰⁴ See www.cps.gov.uk/news/press_releases/133_04/index.html. The Crown Prosecution Service is subject to inspection of its operations, with a report being made to the Attorney General by the Chief Inspector, the Crown Prosecution Service Act 2000, s 2.

(e) *If a matter is subject to both a public inquiry and a criminal investigation how does it proceed (criminal first/concurrent investigation, etc)?*

2.14 A criminal investigation and trial will precede any public investigation for two main reasons. First, information may be disclosed at a public investigation which might seriously compromise any subsequent trial. Secondly, a public inquest may be in a position to hear evidence from individuals who have been granted immunity from any potential prosecution in respect of any evidence given at the inquiry.¹⁰⁵

2.15 An example of this order of proceedings can be seen in the Baha Mousa Public Inquiry (see para 1.33 and footnote 75) which could not begin until the end of criminal proceedings in the *R v Payne* case, which involved the death of Mr Baha Mousa while under the custody of British soldiers in Iraq (see para 1.21). In *The Queen (application of Ali Zaki Mousa) v Secretary of State for Defence*¹⁰⁶ the Court concluded that the work of the Iraq Historic Allegations Team could proceed (which may lead ultimately to prosecutions) prior to any decision about establishing a further public inquiry into allegations of systemic ill-treatment of a number of Iraqi civilians.

2.16 The Court in *Ali Zaki Mousa* explained the relevant principles as follows: ‘it must not be forgotten that serious allegations of criminal misconduct have been made against British soldiers. Both the Baha Mousa Inquiry and the Al Sweady inquiry followed the conclusion of relevant criminal proceedings. There would be an obvious risk of prejudice to criminal investigations and proceedings if an active public inquiry ran in parallel with them. Moreover, witnesses implicated in alleged abuse would

105 For the Al Sweady Inquiry see the letter of the Attorney General (in agreement with the Director of Public Prosecutions): www.alsweadyinquiry.org/linkedfiles/alsweadyinquiry/key_documents/110118undertakingtowitnessesfromattorneygeneral.pdf.

106 [2010] EWHC 3302 (Admin). This case is discussed in more detail at para. 3.45.

be unlikely to give evidence to a public inquiry unless they were first given immunity from prosecution and, in the case of military witnesses, immunity from disciplinary action, as has been done in both the Baha Mousa and the Al Sweady inquiry; and in practice this would have to wait at least until charging decisions had been made.’ On appeal, the Court of Appeal disagreed on the facts with the High Court, finding that the Royal Military Police could not be perceived to be sufficiently independent of the Iraq Historic Allegations Team and that the Secretary of State must reconsider how the UK should comply with the investigation requirements of Article 3 of the Convention.¹⁰⁷

(f) Are there any specific laws applicable to members of civilian security services? If so, please briefly describe.

2.17 The security and intelligence services of the UK are established by statutes, the Security Service Act 1989 and the Secret Intelligence Services Act 1994 (which includes the Government Communications Headquarters). Members of the armed forces are under no Service obligation to obey orders from any member of the security services. Members of the security services are not members of the armed forces subject to Service law. Thus, they could not be tried by the Court Martial.

2.18 In 2009 the Attorney General invited the Metropolitan Police (in London) to ‘investigate the allegation of possible criminal wrongdoing... in a case of alleged complicity [in torture] by an intelligence officer who interviewed [a British resident] in Pakistan.’¹⁰⁸

107 [2010] EWHC 3302 (Admin), para. 129 and on appeal to the Court of Appeal, [2011] EWCA Civ 1334. For the Baha Mousa Inquiry see para. 1.33 and footnote 75. For the Al Sweady Inquiry see para. 1.35 above.

108 Joint Select Committee on Human Rights [of the UK Parliament], 23rd Report of Session 2008-2009, at para. 97: see www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/152/15202.htm. The Report also recommended that ‘the independent inquiry which was set up to investigate allegations of UK complicity in torture should also be required to make recommendations about improving the accountability of the security and intelligence services, and for removing any scope for impunity, para. 101. The independent inquiry was known as the Detainee Inquiry and it was to be chaired by a former High Court Judge, Sir Peter Gibson. Its function was to

2.19 In certain circumstances a British citizen or resident could be charged in England with a crime committed abroad. The Criminal Justice Act 1948 provides that ‘any British subject employed by Her Majesty’s Government in the service of the Crown who commits, in a foreign country, when acting or purporting to act in the course of his employment, any offence which, if committed in England, would be punishable on indictment shall be guilty of an offence and subject to the same punishment as if the offence had been committed in England.’ This potential criminal liability of a member of the security forces acting abroad is, however, tempered by the Intelligence Services Act 1994 immunity if the ‘act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section.’¹⁰⁹

2.20 Individuals who are not employed by the Government, such as employees of private security firms, would be liable for any alleged breaches of LOAC in the same way as any other person. Where the LOAC violation has occurred abroad their liability to English law will depend on the extra-

determine “whether, and if so to what extent, the UK Government and its security and intelligence services were involved in, or aware of, the improper treatment of detainees, including rendition. It will consider the UK’s policy in response to developing awareness of the changing practices of other countries towards detainees held in counter-terrorism operations”. Its webpage can be found at: www.detaineeinquiry.org.uk/about. In a statement (Hansard, House of Commons (Jan. 18, 2012), col. 729) the Lord Chancellor and Secretary of State for Justice informed the House that the Government would ‘bring the work of [the] inquiry to a conclusion [but that] the Government fully intend to hold an independent, judge-led inquiry, once all police investigations have concluded... meanwhile, however, the police inquiries that have now commenced must obviously continue, (col. 752). The civilian police inquiries concerned a decision by the Director of Public Prosecutions and the Metropolitan Police Service which referred to “allegations made in two specific cases concerning the alleged rendition of named individuals to Libya and their alleged ill-treatment there were so serious that it was in the public interest for them to be investigated now rather than at the conclusion of the Gibson detainee inquiry”, (*Id.*). The Minister also stated, at col. 760, that “this Government are absolutely clear that we do not engage in torture, we do not condone torture, we do not get engaged in torture in any way, and we are not remotely going to get involved in the cruel and inhuman treatment of detainees in any way”. The Government had also published in 2010 a document entitled, “Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas and on the Passing and Receipt of Intelligence Relating to Detainees”. In *The Equality, Human Rights Commission v. The Prime Minister, The Secretary of State for Foreign and Commonwealth Affairs and Others* [2011] EWHC 2401 (Admin) judicial review was sought in which it was argued that some of the guidance would result in unlawful activity if carried out. In particular, an issue was raised as to whether the hooding of detainees could be carried out in exceptional circumstances. The Court required the Guidance document to be amended so as to prohibit hooding in all circumstances.

109 Section 7 of the Act. The act must be done ‘for the proper functioning of the Intelligence Service... the acts done in reliance on the authorisation... [must be of a] nature and [the] likely consequences will be reasonable, having regard for the purposes for which they are carried out,’ s.7.

territorial reach of particular legislation. This is discussed in paras 1.38, 1.41-1.44. They would not be subject to jurisdiction under the Armed Forces Act 2006 unless they were civilians subject to Service discipline (s.370 and Schedule 15 of the Act).

3. MILITARY JUSTICE SYSTEM

(a) *What breaches of LOAC fall under military law?*

3.01 English law adopts the dualist system in its relationship with international law. Thus, any article in a treaty will only be part of English law if it is implemented into that law by an Act of Parliament. Customary international law is automatically a part of English law but it cannot create a criminal offence under that law unless Parliament implements it directly into English criminal law.¹¹⁰ The effect of this is that a LOAC breach, which has not been created by Parliament as a specific offence under the criminal law of England, could not form the subject of a charge based on that LOAC offence under English civilian or Service jurisdiction.¹¹¹ The facts of the alleged LOAC offence might give rise to a general offence under Service law, as to which see para 3.04 below.

3.02 Following the Armed Forces Act 2006 the term ‘military law’ is of no legal significance. All three main branches of the armed forces became subject to a uniform code, styled as Service law. As a general rule civilians are not subject to the jurisdiction of Service law under the Armed Forces Act 2001. See para 3.13 below for the instances where civilians can be subject to this jurisdiction.

3.03 As shown in para 1.02 above all offences under the criminal law of England will be offences under the Armed Forces Act 2006¹¹² and could be dealt with under the jurisdiction of that Act, ie through trial by the Court Martial. Under English law the court martial can sit at any place in the

¹¹⁰ *R v. Jones* [2006] UKHL 16.

¹¹¹ If a breach of LOAC encompasses *any* breach (however small in terms of gravity) of the international laws of armed conflict the vast majority of such breaches will not amount to specific offences in English law, although the facts may (or may not) give rise to a general offence under Service law discussed in para. 3.04 below.

¹¹² Section 42.

world or in the UK.¹¹³ The most likely LOAC charges would be based on the International Criminal Court Act 2001 (which makes it an offence under English law to commit the offences set out in Article 6 (genocide), Article 7 (crimes against humanity) and Article 8 (war crimes)).¹¹⁴ Command responsibility is made a mode of committing an offence under the 2001 Act.¹¹⁵ Other possible charges could be based on the Geneva Conventions Act 1957 (as amended) which deals with grave breaches of the Geneva Conventions or of Additional Protocol I¹¹⁶ and misuse of the protected emblem.¹¹⁷ Any other criminal offence could be charged even if it was committed during an armed conflict. If a soldier stole money from a civilian or a prisoner of war this could be charged as theft under the ordinary Theft Act 1968.¹¹⁸ Other criminal offences which may be relevant (although considered to be unlikely in practice) could be based on the Chemical Weapons Act 1996, the Landmines Act 2008; the Cluster Munitions Act 2010.

3.04 Service law creates a specific LOAC offence, that of looting.¹¹⁹ This offence involves taking without lawful excuse¹²⁰ any ‘property from a person who has been killed, injured, captured or detained in the course of an action or operation of any of Her Majesty’s forces or of any forces co-

113 Where UK armed forces are present on the territory of another State with its consent it is likely that a status of forces agreement or memorandum of agreement will be necessary to permit the UK to exercise its criminal jurisdiction on the territory of that State.

114 These offences are set out in Schedule 8 of the 2001 Act. Following the recommendations of the Review Conference in Kampala, 2010, of the States parties to the Rome Statute 1998 a Minister of the Foreign and Commonwealth Office told Parliament that “the UK will now consider whether to ratify the amendment on the use of certain weaponry in a non-international armed conflict”, *Hansard*, House of Lords, Col 1061 (Jul. 22, 2010).

115 By s. 65 of the 2001 Act.

116 Section 1; There will be some overlap with the grave breaches of the Geneva Conventions 1949 in the 1957 Act and Article 8 (2)(a) of the Rome Statute in the 2001 Act, but this is not likely to cause any legal difficulty for prosecutors. This is because the grave breach offences in the 1957 Act (as amended) apply to any person who commits a grave breach anywhere in the world, whereas the offences under the Criminal Court Act 2001 apply to British nationals or British residents only.

117 Section 6.

118 See also the overlap with looting as an offence under the Armed Forces Act 2006, s. 4 discussed in para. 3.04 below.

119 Section 4, Armed Forces Act 2006.

120 This casts an evidential burden on the accused to adduce sufficient evidence to raise an issue of whether he did have a lawful excuse, s. 325, Armed Forces Act 2006. He does not have the burden of proving to the Court Martial that he did have a lawful excuse. After the accused has raised sufficient evidence it will be for the prosecution to prove he did not have a lawful excuse if he is to be convicted.

operating with them.¹²¹ It also creates other Service offences which could be charged to cover less serious breaches of LOAC (although these offences are not limited to LOAC breaches) These include disobedience to lawful commands;¹²² contravention of standing orders;¹²³ negligent performance of a duty.¹²⁴ In addition, a person subject to Service law could be charged with ‘conduct prejudicial to good order and discipline’.¹²⁵

(b) *What options are available under military law for the investigation of possible LOAC violations (e.g. criminal investigations, boards of inquiry, operational command or unit level investigations)?*

3.05 Alleged breaches of LOAC will, in practice, be investigated by the Special Investigations Branch (SIB) of the Royal Military Police (RMP), or indeed, any of the other two Service police forces. All members of the Service police are members of the armed forces and will, in consequence, be subject to Service law. The SIB is to be contrasted with the General Police Duties (GPD) of the RMP. The difference between the two branches is as follows: ‘Traditionally the chief role of General Police Duties personnel operations was traffic control and regulations; ensuring the free movement of vehicles on military routes. Since the recent conflicts in Iraq and Afghanistan the role of General Police Duties has changed considerably and they are now more likely to find themselves in the front line in support of the fighting troops conducting close combat policing; providing surety for detention operations; close protection; host nation police monitoring;

121 It will be noted that this offence is not limited to circumstances of an armed conflict. Its predecessor offence (in the Army Act 1955, s.30) applied only to ‘war-like operations.’

122 Section 12, Armed Forces Act 2006; The maximum sentence for this offence is 10 years imprisonment.

123 Section 13, Armed Forces Act 2006; The maximum sentence for this offence is two years imprisonment.

124 Section 15, Armed Forces Act 2006; Any term of imprisonment must not exceed two years for this service offence. A senior non-commissioned officer, a major and the commanding officer of a regiment were charged with the predecessor version of this Service offence (under the Army act 1955) in *R v. Payne*. This case involved the death of an Iraqi civilian whilst detained by British forces in Iraq. The case is discussed above at para. 1.21.

125 Section 19, Armed Forces Act 2006; It is a very general offence, which covers acts and omissions, without any further requirements in relation to the *actus reus* or the *mens rea*. For an explanation of its meaning see *R v. Armstrong* [2012] EWCA Crim 83. The maximum length of imprisonment for this offence is two years imprisonment.

forensic and evidence gathering and acting as first responders for the investigation of attacks on British troops. In relation to investigations General Police Duties personnel both on operations and in the garrison act as a trigger for the more experienced and better equipped and trained Special Investigation Branch Investigators.¹²⁶ Should it be suspected that a Service policeman or woman of one Service police force is involved in some way with a LOAC violation (as a principal or secondary party to it) it is likely that the investigation would be taken over by one of the other Service police forces. Alternatively, any investigations could be conducted by the civilian police since the LOAC violation would be likely to involve the commission of a criminal offence over which the English civilian courts will have jurisdiction.

3.06 The Provost Marshal is the head of each Service police force. The Provost Marshal (Army) is, for instance, responsible to the Army Board of the Defence Council (on which sit senior officials from the Ministry of Defence and Government Defence Ministers).¹²⁷

3.07 The independence of Service police¹²⁸ investigations is discussed below (para 3.20).

126 This passage is quoted in, and relied upon by the Divisional Court in *The Queen (Application of Ali Zaki Mousa) v. Secretary of State for Defence* [2010] EWHC 3304 (Admin), at para. 74. The Court of Appeal held, however, that 'the involvement of the Provost Branch on the ground in Iraq... [and] the involvement of GPD [General Police Duties] members in IHAT [Iraq Historic Allegations Team]' was such as to show that IHAT lacked 'hierarchical, institutional and practical independence having regard to the role of the PM(A) [Provost Marshal (Army) and members of RMP (GDP and SIB),' paras. 34, 36, 38. Since most allegations of LOAC violations have involved soldiers (rather than Royal Navy or Royal Air Force personnel) the example of the Royal Military Police has been given. It would, however, be permissible under the 2006 Act for one Service police force to investigate the actions of a member of another branch of the armed forces. A Service police investigating officer will be under the command of one of the Service police provost marshals. The investigator is directed that 'in conducting an investigation, [he] should pursue all reasonable lines of inquiry whether these point towards or away from the suspect,' Criminal Procedure and Investigations Act 1996 (Code of Practice) (Armed Forces Act 2006) 2009/989, Schedule 1, para. 3(5). For an example of where the civilian police were requested to conduct an investigation into alleged LOAC violations in Iraq but considered that they could not do so for practical reasons see *R (on the application of Al-Sweady) v. Secretary of State for Defence* [2009] EWHC 2387 (Admin), para. 62.

127 *The Queen (Application of Ali Zaki Mousa) v. Secretary of State for Defence* [2010] EWHC 3304 (Admin), para. 32.

128 The term 'Service police force' includes the Royal Navy Police, the Royal Military Police, or the Royal Air force Police, the Armed Forces Act 2006, s. 375.

3.08 A person subject to service law may be arrested by another person subject to Service law. There are limitations as to who may arrest an officer, although a Service policeman can do so. A service police officer may search the person arrested if he has reasonable grounds to believe that he might be in possession of evidence relating to a criminal offence or a Service offence.¹²⁹ Premises may be searched if the Service police officer is in possession of a warrant issued by a judge advocate.¹³⁰

3.09 A commanding officer's powers to investigate an alleged breach of LOAC are now extremely limited. Any such offence is, almost certainly, a serious offence which may only be investigated by the Service police. Thus, any alleged breach of the International Criminal Court Act 2001 (genocide, crimes against humanity or war crimes) would debar the commanding officer from making any investigation or deciding whether a charge should, or should not, be brought.¹³¹ It will be for the Service police to refer a matter to the independent Service Prosecution Authority (headed by a civilian, see paras 3.19; 3.47) to decide what, if any charges, should be brought before the Court Martial. The decision to prosecute, or not to do so, sits wholly outside the chain of command.¹³² Neither the commanding officer nor anyone senior to him or her in the chain of command has any power to override a decision by the Service police to refer a case to the Director of Service Prosecutions. Whilst it is possible that a Service offence, which is not listed in Schedule 2 to the Armed Forces Act 2006, could be such as to enable the commanding officer to decide whether to investigate and bring charges (or not) against subordinates it is likely that higher command

129 *Id.*, at s 70.

130 *Id.*, at s 83; The judge advocate is a civilian judge, whose role is discussed in para. 3.17.

131 This is because the offences set out in sections 51 and 52 of the 2001 Act are Schedule 2 (of the Armed Forces Act 2001) offences. Schedule 2 also covers crimes under the 2006 Act, s 42 such as murder, manslaughter or kidnapping. Prior to the Armed Forces Act 2006 a commanding officer had the power to decide whether an investigation was necessary and to decide whether a charge should not be brought. This led to the Williams incident and the involvement of the Attorney-General for England, discussed at para. 1.07.

132 In order to preserve the nature of the commanding officer's role, the Service Police must notify the commanding officer when they refer a case to the Service Prosecution Authority for their decision as to whether to charge a Serviceman or woman and as to the particular charges, Armed Forces Act 2006, s 118.

would nominate, for these purposes, an officer of rank equal to that of the commanding officer but outside his operational command structure.¹³³

3.10 In the light of para 3.09 above there is no scope for operational level or unit level investigations of possible LOAC violations. Investigations of breaches of standing orders or of other operating procedures may, of course, be conducted at this level but once a commanding officer (or a reasonable person in his position) becomes aware that a serious LOAC violation by someone under his command may have taken place he must make the Service police aware of this fact. It would then become their duty (and not his) to investigate. It is possible, however that in 'exceptional circumstances' a commanding officer might begin to investigate a Schedule 2 offence. This would occur where for 'operational reasons, no Service Police are available to attend the scene and investigate... if this situation arises, the [commanding officer] should be aware that he has departed from the normal procedure and should bring the Service Police into the investigation as soon as is reasonably practicable'.¹³⁴

3.11 It should not be forgotten that the commanding officer plays a crucial role in the maintenance of discipline and within the structure of the Armed Forces Act 2006. To avoid legal responsibility himself relating to the actions of those subordinate to him he will need to take positive steps to keep himself aware of their acts or omissions which could result in an allegation of a LOAC violation. This may mean that officers or non-commissioned officers will be required to notify him of any incidents affecting civilians in the course of military operations or where any ammunition is fired during the course of a patrol in civilian areas. Any failure on the part of

133 In *The Queen (Application of Ali Zaki Mousa) v. Secretary of State for Defence* [2010] EWHC 3304 (Admin), para. 66 the Court stated that "we were also told (and this is supported by what Colonel... says in his witness statement about three soldiers recently charged) that all potential suspects will be under a specially nominated commanding officer who will not be the commanding officer of the unit of which they were members at the time of the events in question".

134 See para. 3.09 above. Further guidance is given to commanding officers by the *Manual of Service Law*, JSP 830, Version 2 (2011), chapter 6, paras. 30-31.

the commanding officer to investigate could result in him being charged with the Service offence of failing to perform a duty or doing so negligently (see para 1.47) or being a secondary party to the crime committed by the subordinate (which includes command responsibility – see paras 1.45-1.46). Where the facts of an incident would show a reasonable commanding officer that a Schedule 2 offence might have been committed he must report this to the Service police (paras 3.09, 3.10) or possibly to the Director of Service Prosecutions if it was an offence over which the commanding officer had jurisdiction (see footnote 161).

3.12 Boards of inquiry are styled, Service Inquiries, following the Armed Forces Act 2006.¹³⁵ An inquiry is usually convened following the death of a person subject to Service law. The function of the Service inquiry is to ‘investigate and report on the facts relating to the matters specified in its terms of reference.’¹³⁶ It is not appropriate for any investigation into alleged breaches of LOAC.

(c) *Can civilians be the subject of such investigations?*

3.13 Civilians will be subject to Service law in limited cases. The Armed Forces Act 2006 determines when a civilian will be subject to Service discipline.¹³⁷ In the context of LOAC the most relevant categories of civilians subject to UK Service discipline are persons in one of Her Majesty’s aircraft in flight or in one of Her Majesty’s ships afloat, Crown servants in designated areas working in support of Her Majesty’s forces, persons working for specified military or other organisations abroad,

¹³⁵ See s 343.

¹³⁶ Armed Forces (Service Inquiries) Regulations 2008, SI 2008/1651, regulation 7; A Service inquiry may be convened by a Colonel (or equivalent). Apart from investigating the facts of a death the person convening a Service inquiry must also require the inquiry to consider if anything relating to the death of a person subject to Service law could raise issues of consequence to the armed forces which are not apparent from the death, regulation 4.

¹³⁷ Section 370.

persons designated by or on behalf of the Defence Council.¹³⁸ Any other British national who is within the custody of British or allied armed forces and who does not come within a class of persons specified in Schedule 15 to the 2006 act will not be subject to Service disciplinary procedures. Thus, none of the following would be subject to UK Service law, a foreign national detained by British armed forces in the course of military operations (e.g. in Iraq or Afghanistan), a British national who has joined an organised armed group to fight British armed forces, a captured prisoner of war.¹³⁹

(d) Provide a general description of the structure of the military justice system and the role of military courts, prosecution authority (including any military AG/JAG or similar authority) and military police regarding the investigation and prosecution of breaches of the laws of armed conflict.

3.14 Until the coming into force of the Armed Forces Act 2006 the three branches of the British armed forces were governed by their own separate legislation. The reason for this was largely historical. The relevant legislation was the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957. Also for historical reasons the governing legislation of the armed forces has to be renewed ever five years. The opportunity was taken in the Armed Forces Act 2006 to bring all three services into one uniform code of discipline, to be styled as Service law.¹⁴⁰ The Armed Forces Bill, currently before Parliament, must be passed into law no later than ‘the end of the year 2011’¹⁴¹ when the 2006 Act will expire. This unique constitutional arrangement, dating back to the Bill of Rights 1689, does give Parliament a quinquennial opportunity to discuss detailed matters relating to the armed forces and to make amendments to the law governing

¹³⁸ Schedule 15, Armed Forces Act 2006.

¹³⁹ The subjection of a prisoner of war detained by UK armed forces to Service jurisdiction is to be modernised in the Armed Forces Bill 2011, so as to make a prisoner of war subject to the Armed Forces Act 2006 for crimes committed after capture. See also footnote 84 above.

¹⁴⁰ ‘Service’ law is a neutral term given that Military law, Air Force law and Naval law are combined in the Armed Forces Act 2006.

¹⁴¹ Armed Forces Act 2006, s. 382(4); The Armed Forces Act 2006 will then be extended, with amendments, to expire no later than 2016. There will then need to be an Armed Forces Bill in 2016 and so on.

them.¹⁴² Other security organs¹⁴³ of the Government do not impose a similar requirement on Parliament, or give those services such an opportunity, as possessed by the armed forces, to propose changes to their governing legislation.

3.15 The law relevant to investigation and alleged breaches of LOAC is currently contained in the Armed Forces Act 2006. That Act will apply to persons subject to Service law, which will include the regular forces and (generally) members of the reserve forces when on permanent call-out or when undertaking any training or duty.¹⁴⁴ It will also apply to those civilians who are specifically made subject to Service law.¹⁴⁵

3.16 A person can only be charged under Service jurisdiction if he or she is a serving member or for a period up to six months after ceasing to be a member.¹⁴⁶ If he has been convicted (or acquitted) of the same offence before a civilian court he cannot be charged with that offence again under Service jurisdiction. This principle applies also if he has been tried first under Service jurisdiction.¹⁴⁷ A conviction or acquittal by the Court Martial

142 Another unusual feature (compared with other single Bills going through the various stages of the Parliamentary process) is that, traditionally, each successive Armed Forces Bill is discussed in detail by an Armed Forces Bill Select Committee of the House of Commons, which possess power to call witnesses before it or to require or to invite written evidence.

143 In England the police forces are regional and normally based on counties. There is no national police force (apart from the British Transport Police and the Ministry of Defence Police). The Security Service and the Intelligence Services are established by statute, the Security Service Acts of 1989 and 1996; the Intelligence Services Act 1994. Section 10 of the 1994 Act establishes an Intelligence and Security Committee, whose members are drawn from Parliament (none of whom must be a Government Minister). The Committee is required to make an annual report on the discharge of their functions to the Prime Minister and may at any time report to him on any matter relating to the discharge of those functions. A copy of the annual report is to be laid before Parliament (although redactions can be made if any "matter in a report would be prejudicial to the continued discharge of the functions of either of the Services").

144 See the Armed Forces Act 2006, sections 367, 368, 369.

145 See para. 3.13 above; Armed Forces Act 2006, s. 370 and Schedule 15.

146 Sections 55-61, Armed Forces Act 2006; The Attorney General can give his consent to a prosecution outside this time, *Id.*, at s.61.

147 Sections 66 and 64 respectively. Armed Forces Act 2006. The effect of s. 64 (Service proceedings barring subsequent civilian proceedings) illustrates the equal status given to a conviction or acquittal of a criminal offence (s. 42 of the Armed Forces Act 2006) under Service jurisdiction with that of a civilian court. This is the only example in English law where criminal proceedings can be brought outside the ordinary civilian criminal justice system.

is likely to prevent the International Criminal Court assuming jurisdiction over a British serviceman or woman.¹⁴⁸

3.17 Investigations will be conducted as set out in para 3.05 above. Any serious breach of LOAC is likely to be tried by the Court Martial. This is comprised¹⁴⁹ of a Judge Advocate (as the judicial officer, performing virtually the same role as would a judge in the Crown Court in England, although with a panel of between three and seven¹⁵⁰ Service officers and warrant officers¹⁵¹ rather than a jury). The Judge Advocate holds a civilian judicial appointment (as with any other civilian judicial appointment).¹⁵² Despite the use of the term ‘judge advocate’ in the armed forces of other States, the Judge Advocate at a Court Martial under the Armed Forces Act 2006 is not a member of the armed forces. It was, to a great extent, the role of the civilian Judge Advocate in a court-martial (as it was styled before the 2006 Act) which enabled the European Court of Human Rights to decide that a British Army or Royal Air Force court-martial¹⁵³ could be an ‘independent and impartial tribunal’. The rulings of the Judge Advocate

148 Article 20(3) of the Rome Statute of the International Criminal Court will have been met. Compare if the alleged breach of LOAC was dealt with summarily before a Serviceman or woman’s commanding officer discussed in para. 3.18 below.

149 Section 155, Armed Forces Act 2006.

150 Section 155(1)(b), (2), (3), Armed Forces Act 2006.

151 A warrant officer (the most senior non-commissioned officer) may be appointed also as a member of the panel of the Court Martial, Armed Forces Act 2006, s. 155(3)(a), 156.

152 He or she will be a member of the Judge Advocate General’s Office, a civilian organisation. Many Judge Advocates also sit part-time as trial judges in the civilian Crown Courts, presiding over trials with a civilian jury. This can give valuable experience in equating Court Martial practice as far as possible with trials in the Crown Court. Clause 23 of the Armed Forces Bill 2011 (currently progressing through Parliament) provides authority for judge advocates to sit in the Crown Court or in magistrates’ courts for the purpose of gaining experience in purely civilian courts. There is no impediment to the Judge Advocate General requesting a High Court Judge to sit as the Judge Advocate for a particular case. This was done in *R v. Payne* (see para. 1.21 above). For the statutory power for the Judge Advocate General to act in this way see the Armed Forces Act 2006, s. 155(5) which provides that “the judge advocate for any proceedings is to be specified by or on behalf of the Judge Advocate General”. In s. 362 of the Act the power is granted specifically to the Lord Chief Justice (on the request of the Judge Advocate General) to appoint a High Court judge (a ‘puisne’ judge) to sit as a judge advocate. It is therefore clear that the Judge Advocate at the Court Martial can only be appointed by a superior judicial officer and not by any member of the armed forces or the executive arm of the Government.

153 The pre-2006 Act system of naval courts-martial was not compliant with the European Convention on Human Rights, Article 6 (right to independent and impartial tribunal) since all its members were drawn from the Royal Navy (including the judge advocate); *Grievs v. United Kingdom* (2004) 39 EHHR 2.

in a particular case on issues of law, procedure or practice are binding on the Court Martial;¹⁵⁴ he cannot be outvoted by the panel. The decision of the Court Martial on the finding of guilty or not guilty is the sole responsibility of the panel members. The Judge Advocate has no vote on this issue, which preserves the similarity with a jury verdict in the civilian courts.¹⁵⁵ He does, however, have a vote (and if necessary, the casting vote) on the issue of the sentence to be imposed.¹⁵⁶

3.18 A commanding officer has power to hear a case summarily in relation to certain offences and middle to junior ranking members of the armed forces (see also para 3.49).¹⁵⁷ This procedure is designed to produce speedy decisions, primarily for breaches of service discipline. The Serviceman or woman is not entitled to legal representation but he or she can, instead, elect to be tried by the Court Martial.¹⁵⁸ In effect the individual can insist on his or her right to an ‘independent and impartial tribunal’¹⁵⁹ through electing for trial by the Court Martial or waiving such a right by not electing and thereby agreeing to a summary hearing by his or her commanding officer. Of the purely Service offences referred to in para 3.04 above (dealing with alleged LOAC breaches) a summary hearing can deal with certain aspects of looting, with disobedience to a lawful command and negligent performance of a duty.¹⁶⁰ It can also deal with a limited number

154 Section 159(2), Armed Forces Act 2006.

155 Section 160, Armed Forces Act 2006; A distinction, however, is that in civilian courts a jury comprises 12 members. A majority verdict of guilty can be entered on a vote by the jury of 10-2. Where at least 10 members of a jury are unable to agree as to guilt the accused must be acquitted. In the Court Martial a serious case would normally have five or seven members of the panel. A bare majority is sufficient to bring in a guilty verdict. The fact that a majority is sufficient is not ‘inherently unsafe’, *Reference by the Judge Advocate General* [to the Court Martial Appeal Court], [2010] EWCA Crim 2973, available at: www.bailii.org/ew/cases/EWCA/Crim/2010/2973.html.

156 Section 160, Armed Forces Act 2006; Given that the Court Martial may try ordinary crimes (s. 42 Armed Forces Act 2006) the experience gained by a Judge Advocate sitting part time as a judge in the civilian Crown Court with a jury can provide useful experience in relation to sentencing for similar criminal offences (e.g. assaults, sexual offences).

157 The Serviceman or woman must be below the rank of lieutenant colonel.

158 Section 129 Armed Forces Act 2006.

159 Article 6, European Convention on Human Rights 1950.

160 Section 53 Armed Forces Act 2006.

of criminal offences.¹⁶¹ In practice the dividing line between a summary hearing and a Court Martial trial will depend upon the seriousness of the alleged LOAC breach and the sentencing powers of each process. The maximum sentence which the Court Martial can impose will depend upon the statutory maximum for that individual offence but, in an appropriate case, it could be life imprisonment. For a summary hearing the maximum punishment is detention in a military barracks or training unit¹⁶² of up to 90 days,¹⁶³ a fine of up to 28 days' pay,¹⁶⁴ or reduction in rank.¹⁶⁵

3.19 Prosecutions are brought by the Service Prosecuting Authority. This is headed by the Director of Service Prosecutions, currently a civilian senior lawyer.¹⁶⁶ He is assisted by Service lawyers as prosecuting officers.¹⁶⁷ The Service Prosecuting Authority is subject to inspection by Her Majesty's

161 These are set out in Schedule 1, Armed Forces Act 2006. The most likely as being relevant to a LOAC breach would be theft or criminal damage, assault occasioning actual bodily harm. It is possible that the commanding officer could refer to the Director of Service Prosecutions an offence which the commanding officer could handle him/herself, see Armed Forces Act 2006, s. 120(3). The *Manual of Service Law*, JSP 830, Version 2 (2011) Vol. 1, at para. 83 states that "any form of violence or abuse against the victim should be recognised as having disciplinary implications. In such cases the commanding officer should refer the matter to the [Director of Service Prosecutions], unless the [commanding officer] is completely satisfied (with legal advice) that he should bring the charge himself". This is more particularly likely to be the case where the victim is a civilian and where the alleged incident occurred during the course of military operations abroad. It is probable that this is the passage in the form of guidance referred to by Richards LJ in *The Queen (on the application of Ali Zaki Moussa) v. Secretary of State for Defence* [2010] EWHC 3304 (Admin), para. 65. See also Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009/2055.

162 This is to be contrasted with imprisonment in a civilian prison. Military detention will include additional military training.

163 This will be the case if the commanding officer has higher authority to impose up to this level; otherwise it will be 28 days, Armed Forces Act 2006, s. 133.

164 Section 136, Armed Forces Act 2006. This section also limits the forfeiture of pay to 14 days in certain cases.

165 Sections 134, 135, Armed Forces Act 2006.

166 The appointment is made by Her Majesty the Queen, who is constitutionally distinct from the Government, Armed Forces act 2006, s. 364. See also the proposed appointment of the Provost Marshal in the Armed Forces Bill, 2011, Clause 5, discussed in para. 3.44 below. The Armed Forces Act 2006 established the post of Director of Service Prosecutions and advertised the post. A civilian was appointed. Prior to the 2006 Act each branch of the armed forces had its own prosecuting authority, headed by a senior Service lawyer. The independence of the new Service Prosecuting Authority from the chain of command is clearly established by the appointment of a civilian and by the nature of the appointment (by Her Majesty the Queen rather than by the Ministry of Defence). See also footnotes 171, 203. The Armed Forces Act 2006 does not prevent a member of the armed forces from being appointed as the Director of Service Prosecutions. The Deputy Director of Service Prosecutions is currently an Army Legal Services brigadier, see <http://spa.independent.gov.uk/index.htm>. The Armed Forces Bill 2011, clause 21, will enable the Director of Service Prosecutions to appoint civilians as prosecuting lawyers. See also para. 3.34 below.

167 Armed Forces Act 2006, s. 365.

Crown Prosecution Inspectorate. The latest figures available (2009) show that 795 cases were referred by the Service Prosecuting Authority for trial by the Court Martial.¹⁶⁸ The 'Prosecutors' Pledge' of the Service Prosecuting Authority includes notifying victims if a prosecution is not to be brought. See, <http://spa.independent.gov.uk/linkedfiles/spa/report2008.pdf> (at Annex C). It is possible that judicial review of a decision of the Service Prosecuting Authority not to prosecute could, as with the Crown Prosecution Service (see para 2.09), be taken to the High Court. The relationship between the Director of Service Prosecutions and the Attorney General is discussed at para 3.34 below. It should be noted that the consent of the Attorney General is required for a prosecution of any person (whether subject to Service law or a civilian before the civilian courts) for serious violations of LOAC under the Geneva Conventions Act 1957, the Criminal Justice Act 1988 (s. 134, which deals with torture) the War Crimes Act 1999 or the International Criminal Court Act 2001.

3.20 As shown in para 3.05 above, the Service police provide the principal form of investigation of cases prior to referral of the case to the Service Prosecuting Authority. Should they decide, after an investigation, not to refer the case to the Director of Service Prosecutions on the grounds that, in their view, there is insufficient evidence to charge an individual with a Schedule 2 offence they must still consult the Director of Service Prosecutions (Armed Forces act 2006, s. 116(4)). The effect of this is that a person outside the armed forces (the Director of Service Prosecutions) will become aware of all Schedule 2 cases reported to the Service police. Where no charge is to be brought under Schedule 2 the case may be referred back to the Commanding Officer to determine whether he could charge the individual with a Service offence which is not a schedule 2 offence. The Service Police are also subject to inspections by Her Majesty's Inspectorate of Constabulary to ensure that the standards of the Service police are

168 See www.hmcpis.gov.uk/documents/services/reports/SPA/SPA_Dec10_rpt.pdf, at p.10.

broadly comparable to their civilian counterparts.¹⁶⁹ An issue which is of particular relevance in alleged LOAC breaches is the independence of the Service police, or of individual Service police officers, from any interference with their work by any individual in the chain of command.¹⁷⁰ This issue has been addressed by the Armed Forces Bill 2011 which will direct that the Provost Marshal (the Head of the Service police) will be appointed by Her Majesty the Queen and not by the Ministry of Defence.¹⁷¹

(e) *What is the basis for jurisdiction over LOAC breaches under military law (territorially, nationality, passive personality, protective jurisdiction)?*

3.21 Jurisdiction over members of the regular armed forces to Service law is based purely on the fact that they are members of such forces. Reserve forces will subject to Service law while on permanent call-out under the Reserve Forces Acts 1980 and 1996 or while undertaking any training or duty.¹⁷² The effect of this is that a serviceman or woman takes the criminal law of England with him or her wherever in the world they are deployed.¹⁷³ He or she will also be liable for the Service offences contained in the Armed Forces Act 2006.¹⁷⁴ There is no limitation of jurisdiction based on the nationality of the victim or of a member of the British armed forces.¹⁷⁵

169 See for the Royal Military Police: www.hmic.gov.uk/sitecollectiondocuments/mod/rmp_20060731.pdf; for the Royal Navy police: www.hmic.gov.uk/sitecollectiondocuments/mod/rnp_20101115.pdf; and for the Royal Air Force Police: www.hmic.gov.uk/sitecollectiondocuments/mod/raf_20100212.pdf. The Armed Forces Bill 2011, Clause 4 will require that “Her Majesty’s Inspectorate of Constabulary are to report to the Secretary of State on the independence and effectiveness of investigations carried out by each Service police force”. The Inspectors’ reports are to be laid before Parliament, *Id.*

170 See, for example, discussion of this issue in *The Queen (on the application of Ali Zaki Mousa) v. Secretary of State for Defence* [2010] EWHC 3304 Admin) paras. 68-87. This passage was not criticised by the Court of Appeal in this case, [2011] EWCA Civ 1334.

171 Armed Forces Bill 2011, Clause 5. Appointment by HM the Queen provides actual and perceived independence from the Ministry of Defence. See also footnotes 166 and 203.

172 Sections 367-369, Armed Forces Act 2006. See also the Visiting Forces (British Commonwealth) Act 1933, s. 4(3)(a) which refers to individual servicemen or women of the armed forces of a British Commonwealth country attached to British armed forces.

173 Section 42, Armed Forces Act 2006, discussed in para. 1.02 above.

174 The whole body of these Service offences (apart from the incorporation of the whole of the criminal law of England by s. 42) is contained in Sections 1-41 of the 2006 Act. The most likely criminal offences or service offences which might be charged in relation to an alleged breach of LOAC are set out in paras. 3.03-3.04 above.

175 A limited number of non-UK nationals are recruited into the British armed forces either for historical

There is therefore no significance in English law of the terms set out in this question.

(f) *Who is subject to military law? Can jurisdiction be exercised over civilians and if so under what circumstances?*

3.22 Paras 3.21 and 3.13 above discussed who is subject to UK Service law. Thus, in limited circumstances civilians can be subject to Service discipline (para 3.13).¹⁷⁶ A special court, the Service Civilian Court has been created to deal with prosecutions of civilians subject to Service discipline. The most significant aspect of this court is that it has jurisdiction over non-indictable offences against the criminal law of England and it can only exercise this jurisdiction outside the British Islands.¹⁷⁷ It would not, however, have jurisdiction to hear a prosecution of a civilian subject to UK Service discipline for an alleged breach of LOAC (assuming that alleged breach was an offence under English law and an indictable offence). In practice a LOAC violation committed by a person subject to Service discipline would have to be tried by the Court Martial or by a civilian court in England.

3.23 English common law developed a concept of ‘martial law’ to cover a situation where law and order had broken down on territory to which English law applied to such an extent that the courts were unable to sit to administer justice. A proclamation of martial law by the senior military officer on the spot would give the right to the British Army to maintain law and order and to subject civilians to trial by court-martial. There are two modern instances of this occurring, In British territory during the Boer war in South Africa at the end of the 19th century and in (what is now the Republic of) Ireland in 1920.¹⁷⁸ It is quite distinct from military

reasons (e.g. the Gurkha battalions, who are nationals of Nepal) or their being citizens of the British Commonwealth of nations. The authority to recruit non-UK nationals is to be found in the Armed Forces Act 2006, s. 340.

176 The Armed Forces Act 2006, s. 370 and Schedule 15.

177 *Id.*, at sections 51(1) and 51(3).

178 *Re Clifford and O'Sullivan* [1921] 2 AC 570, 581 where the Court stated that a court under martial

law (now styled as Service law) since Service law is based upon statute. It is considered very unlikely that martial law would be invoked in modern conditions.¹⁷⁹

(g) *What disciplinary or punitive actions can be taken when a violation of LOAC is determined to have occurred (e.g. censure, reprimand, discharge from the military, imprisonment).*

3.24 A serious violation of LOAC is likely to be heard by the Court Martial. In addition certain Service offences could be charged as an alternative to a formal breach of LOAC charge or to cover, for instance, some form of command responsibility.¹⁸⁰ The various punishments which the Court Martial can impose are set out in s.164 of the Armed Forces Act 2006. The following relevant punishments¹⁸¹ are available to the Court: imprisonment;¹⁸² dismissal with disgrace from Her Majesty's service; dismissal from Her Majesty's service; detention¹⁸³ for a term not exceeding two years; forfeiture of a specified term of seniority or of all seniority (a commissioned officer only); reduction in rank (non-commissioned officers only); a fine;¹⁸⁴ a severe reprimand or a reprimand (not available in respect

law "is not a court or judicial body in any legal sense of those terms... but a military committee for considering a matter arising under the proclamation and advising the commanding officer thereon". See also *Tlonko v. Natal* 1907 AC 93, 94-95 "this state of war does not depend upon a proclamation of martial law, but is based upon the right to administer force against force"; *Ex Parte Marais* [1902] 109 (martial law could be imposed even where the civilian courts were continuing to function).

179 To do so the UK would have to enter a derogation to Articles 5 (detention) and 6 (fair trial) of the European Convention on Human Rights.

180 For discussion see paras. 1.45-1.47 above.

181 Section 164 does provide some limitations on imposing certain punishment. It has traditionally been the case that the punishments which could be imposed by a court-martial (now the Court Martial) are set out in descending order of severity.

182 Since it is likely that a serious breach of LOAC would involve an offence against the criminal law of England the maximum term of imprisonment which the Court Martial can impose will be the same as if the offence had been tried by the courts in England.

183 Detention is to be contrasted with imprisonment. A sentence of detention will be served in a Service detention centre and will normally involve military training. Imprisonment will be served in a civilian prison, where the Serviceman or woman will be treated in exactly the same way as any civilian prisoner. A commissioned officer cannot be sentenced to a period of detention but he could be sentenced to imprisonment.

184 The maximum fine which the Court Martial can impose will be the same as if the case had been heard in the courts in England (for the same reasons as given above for imprisonment).

of a private soldier); such minor punishments as may from time to time be authorised by regulations; a Service compensation order.

3.25 A less serious breach of LOAC could be dealt with summarily by the soldier's commanding officer.¹⁸⁵ In addition certain Service offences could be charged as an alternative to a formal breach of LOAC charge or to cover, for instance, some form of command responsibility.¹⁸⁶ Where a commanding officer deals summarily with a charge his powers of punishment are more limited. The commanding officer cannot impose a term of imprisonment, nor can he dismiss a subordinate. His powers to award detention are limited, as are the powers to impose a fine.¹⁸⁷ In other respects he has the same powers as the Court Martial.

3.26 The purposes of sentencing at the Court Martial are set out in the Armed Forces Act 2006. These are the punishment of offenders; the maintenance of discipline; the reduction of Service offences and other crime (including reduction by deterrence); the reform and rehabilitation of offenders; the making of reparation by offenders to persons affected by their offences.¹⁸⁸ The Court Martial can impose a more severe punishment than might otherwise be the case should the offence be shown to have been committed with racial or religious aggravation.¹⁸⁹

3.27 Where a civilian court tries a Serviceman or woman for a criminal offence, which is also a breach of LOAC, that court has the powers of punishment set out in the relevant criminal statute in exactly the same way as if the accused had been a civilian. In other words, the wider forms

185 For discussion of summary hearing by a commanding officer see para. 3.18 above.

186 For discussion see paras. 1.45-1.47 above. An example might be a soldier charged with conduct of a cruel or indecent kind, Armed Forces Act 2006, s. 23. Examples could include the deliberate injury, without good cause, of a pet animal during the course of military operation or by requiring detainees to perform simulated sexual activity.

187 These limitations are set out in para. 3.18 above.

188 Section 237.

189 Section 240.

of punishment set out above and which would be available to the Court Martial will not be available to a judge in a civilian court. In the unlikely event that a Serviceman or woman, convicted by a civilian court for such an offence, is able to continue in his or her Service career he could not be tried for the same offence by the Court Martial.¹⁹⁰

3.28 Should a Servicemen or woman be tried by the Court Martial for a breach of LOAC (which amounts to an offence under English criminal law) this will be a bar to a civilian court trying that individual for the same crime. This is of significance for two reasons. First, it shows that the Court Martial has the same standing as a civilian court to try an individual for a breach of the criminal law of England. Secondly, it will mean that, in practical terms, the Court Martial will be the court before which a person (subject to service law or discipline) will be tried for an alleged breach of LOAC. In so far as that breach amounts to an offence under the International Criminal Court Act 2001 the trial will have the effect of preventing the International Criminal Court assuming jurisdiction over that alleged offender.¹⁹¹

(h) Describe the leadership structure of the military legal system. If there is a military Attorney General, JAG or equivalent person, what is the role of that individual? Advice to commanders? Supervision of the military legal system? Oversight of military justice? Authority within the military justice system? Relationship to military criminal and other investigators?

3.29 Each of the three Services (Royal Navy,¹⁹² Army, Royal Air Force) currently possesses its individual branch of Service lawyers, normally headed by a major general (or equivalent), who will be a lawyer and

190 Armed Forces Act 2006, s 66. He could, however, be tried by the Court Martial for a different offence under Service law if this is shown by the facts.

191 Rome Statute Art 17. In these circumstances the UK will not be shown to be 'unable or unwilling' to try the alleged breach. The statutory framework of the Court Martial is likely to meet the safeguards as set out in Article 17(2)(c), Rome Statute.

192 Traditionally, the Royal Navy has deployed its legally-qualified officers to other Royal Navy duties from time to time. The Army and the Royal Air Force have maintained a purely legal branch, styled as Army Legal Services and Royal Air Force Legal Branch respectively.

who will have served for a number of years in various ranks of his or her Service legal branch. This major general (or equivalent) will be part of the chain of command and will report to his or her immediate superior within that chain. Thus, in the Army a major general is the head of Army Legal Services and he will be under the command of a higher ranking officer holding the office of Adjutant General responsible for a range of services to front line troops. Whilst in theory the superior of the head of Army Legal Services could order him to do something which he judges is improper to do this is unlikely since there will be an 'invisible wall' between his legal responsibilities (owed as a result of being a member of the legal profession) and his duty as an Army officer.

3.30 Lawyers in each of the three Service legal branches will prosecute or defend at the Court Martial. It is, however, possible for civilian lawyers to be instructed to defend at the Court Martial in place of Service lawyers, depending on the wishes of the accused and legal aid being available. Each service lawyer will be under the command (ultimately) of the head of their Service legal branch, who will be the most senior Service lawyer. As legal practitioners they will also be subject to the code of ethics and other guidelines imposed on all legal practitioners by the Bar Council in the case of barristers and the Law Society for solicitors.¹⁹³

3.31 Lawyers in the Service branch may provide legal advice to the Ministry of Defence on matters of international law. That Ministry does, however, employ civilian lawyers to advise it. In addition, the Foreign and Commonwealth Office has a team of civilian lawyers who, in practice, provide legal advice to the Government on issues with foreign policy implications. They will, for instance, be the primary source of legal advice on issues of foreign policy affecting armed conflict. Their advice will be

¹⁹³ The legal profession in England is composed of two types of practitioner, the barrister and the solicitor. The training for each is, at the ultimate stage, different for each. Traditionally, barristers have been court advocates but a number of years ago solicitors (after further training) were granted audience also in the superior courts. Day-to-day experience at the Court Martial shows the advocacy being carried out by barristers or by solicitors or by members of the Service legal branches.

received by the Attorney General for England and Wales but it is his advice which is presented to the Government. The Attorney General is free to seek other legal advice if he or she so wishes. Decisions on any possible prosecutions of Servicemen or women will be taken by the Director of Service Prosecutions discussed below. Decisions on the prosecution of any civilian (who is not subject to UK Service law) will be taken by the Crown Prosecution Service¹⁹⁴ in the normal course of events.

3.32 In order to show independence from the Service chain of command the Armed Forces Act 2006 provided for the establishment of a Service Prosecuting Authority. The Director of Service Prosecutions was appointed to head the Authority. The appointment is made by Her Majesty the Queen,¹⁹⁵ as contrasted with the Ministry of Defence, in order to provide independence from the chain of command. The first holder of this post is an experienced civilian senior lawyer.¹⁹⁶ Details of the working of the Service Prosecuting Authority are set out in para 3.19 above.

3.33 There is no military Attorney General. The Judge Advocate General is a civilian lawyer. He heads the Office of the Judge Advocate General and is responsible for the Judges Advocate who are members of his Office and who act as judges in the Court Martial. All are civilians. The advice of the Judge Advocate is confined to matters appertaining to trial by the Court Martial. He is free to make proposals for change to the Court Martial system directly to Parliament and he has done so.¹⁹⁷

194 This is the body responsible for decisions on prosecutions generally within the civilian court system. To be prosecuted the Crown Prosecution service will have to show that the offence allegedly committed by the civilian came within the jurisdiction of UK law.

195 Armed Forces Act 2006, s 364.

196 Prior to appointment he was (and remains) a Queen's Counsel (QC), the most senior 'rank' of civilian legal practitioner.

197 See the written evidence before the Armed Forces Bill Select Committee 2010-2011, available at: www.publications.parliament.uk/pa/cm201011/cmselect/cmarmed/779/779we11.htm. The ability to make proposals directly to Parliament can be contrasted with the heads of the Service separate legal branches. As members of the armed forces they must act through the Ministry of Defence. They may, however, be questioned by a select committee of either House. This often occurs during the process of the five yearly renewal of the Armed Forces Acts when a select committee on the relevant Armed Forces Bill is established *ad hoc* by the House of Commons.

3.34 The Attorney General of England and Wales adopted, through custom and practice, a supervisory role in relation to the military legal system. See the discussion above concerning the Trooper Williams case (para 1.07). It is likely that this arrangement will continue to apply in respect of the new office of Director of Service Prosecutions, given that for the most serious crimes Servicemen and women will also come within the jurisdiction of the civilian courts and that the Director acts under the superintendence of the Attorney General. In turn, the Attorney General is answerable for the Service Prosecuting Authority to Parliament. As shown in para 3.19 above the Attorney General must give his consent for a prosecution to be brought against a Serviceman or a civilian for any of the serious breaches of LOAC.

3.35 Any legal advice to commanders in the general area of LOAC will be given by the relevant Service lawyer. It is not the function of the Judge Advocate General nor of any civilian lawyer to do so.

3.36 Supervision of the military legal system is provided in a number of ways. First, the Attorney General, is answerable to Parliament for the work of the Service Prosecution Authority and could be questioned there about its work generally or about individual cases. Secondly, it is the constitutional practice in the UK to provide that the relevant Armed Forces Act, which sets out the statutory basis for the military legal system, is renewed every five years. This is preceded by a select committee of the House of Commons, which can call for evidence from those responsible for that legal system. It frequently does so and it can call individuals to give oral evidence. The select committee reports to Parliament. The effect is that, unlike the civilian legal system, there is a quinquennial review process of the whole system. Alterations and changes can then be incorporated into the Armed Forces Act which will renew its predecessor act for a further five years and make any other changes to the earlier Act. Thus, in due course, the Armed Forces Act 2011 will renew the Armed Forces Act 2006 and make any changes to that Act which Parliament deems appropriate.

Thirdly, both the Service police and the Service Prosecuting Authority are inspected from time to time by the appropriate civilian inspection teams which inspect the various police forces and the Crown Prosecuting Service respectively. These inspection teams make their reports to Parliament. Thirdly, as mentioned above the judge advocates of the Office of the Judge Advocate, as independent civilian judicial office holders, act as judges in the Court Martial and advise about the legality, or otherwise, of particular Court Martial proceedings.¹⁹⁸ Finally, the Court Martial Appeal Court is a civilian court, comprised entirely of judges who would normally sit in the Court of Appeal (Criminal Division) hearing appeals from civilian courts.

3.37 The independence of investigators is discussed in section (j) below.

(i) To whom does the aforementioned person report? What authority does that superior exercise over him or her.

3.38 The roles and relationships of the various players in the military legal system are discussed in section (h) above.

(j) What, if any, safeguards are in place (under law, regulation, policy or practice) regarding the independence and impartiality of the various actors in the military who might be involved in the investigation or prosecution of alleged LOAC violations? Is there any relevant case law?

3.39 The options for investigation of alleged violations generally are discussed in section (b) above.

3.40 A feature of the European Convention on Human Rights is that its Court has developed a procedural requirement under Articles 2 and 3 of the Convention (the right to life and the prohibition on torture, degrading

¹⁹⁸ The Judge Advocate General can refer a case to the Court Martial Appeal Court. See para. 3.17 above.

or inhuman treatment respectively) to investigate alleged breaches of these Articles.¹⁹⁹ Such an obligation will only arise in respect of individuals ‘within the jurisdiction’ of the UK.²⁰⁰

3.41 The procedural requirements laid down by the European Court of Human Rights are that any investigation must be independent from those under investigation. This issue is considered in depth at para 1.26 above.

3.42 Within a military context the most difficult of these requirements to meet is that the investigation should be independent. In reality, this means actual and perceived independence from the chain of command.²⁰¹ Of these the most difficult to achieve is perceived independence. This is that a reasonable informed observer would not think that the investigation lacked independence. The fact that a military investigator and a combat soldier will be dressed in similar uniform, use similar vehicles and require protection in a combat zone only adds to the problem of perceived independence of an investigation.

3.43 The overlapping jurisdiction of the civilian criminal law and of service law for an alleged breach of LOAC has been discussed at para 3.03 above. In practical terms the only form of investigation where the alleged breach of LOAC has occurred overseas is a military one. It is crucial, in these circumstances, to ensure that the Service police are not only independent from the chain of command but that they are also perceived to be. There have been suggestions that the Royal Military Police lacked this degree of independence from those within the chain of command.²⁰² This is, however,

199 The requirements are not exactly the same in relation to each Article. See *The Queen (Application of Ali Zaki Mousa) v. Secretary of State for Defence* [2010] EWHC 3304 (Admin), at para. 106. This passage was not criticised by the Court of Appeal in this case, [2011] EWCA Civ 1334.

200 See paras. 1.23-1.25 above.

201 A good example is *Shevchenko v. Ukraine*, Application No 32478/02 (Apr. 4, 2006), where a soldier allegedly committed suicide in barracks. The “independence of the investigators was not ensured”, at para. 71.

202 See, for example, the link between the Royal Military police and a commanding officer in the procedure which applied in 2003, discussed in *Al-Skeini v. United Kingdom*, Application No 55721/07, Judgment

to assume that all members of the Royal Military Police (the most likely Service police force to be involved) perform the same functions. There are, currently, three broad divisions of duties, which are set out in paras 3.05 and 3.06 and their relationship to the independence of investigations is discussed there.

3.44 The Armed Forces Bill 2011 will strengthen the independence of all Service police by requiring the Provost Marshal to be appointed by Her Majesty the Queen (and not by the Ministry of Defence);²⁰³ and by imposing a duty on the Provost Marshal ‘to seek to ensure that all investigations carried out by the force are free from improper interference’ (defined as an ‘attempt by a person who is not a service policemen to direct an investigation which is being carried out by the force’).²⁰⁴ In addition, Her Majesty’s Inspectors of Constabulary will be required to ‘inspect and report to the Secretary of State on the independence and effectiveness of investigations carried out by each service police force.’²⁰⁵

3.45 A combination of a large number of allegations of ill-treatment by detainees in Iraq along with the obligation on the UK to investigate arguable cases of torture, inhuman or degrading treatment under Article 3 of the European Convention on Human Rights led the Ministry of Defence to set up two public inquiries (the Baha Mousa Inquiry; the Al-Sweady Inquiry, both discussed at paras 1.33, 1.35, the former at para 4.28))

of the Grand Chamber (Jul. 7, 2011), at para. 172, “the SIB [Special Investigations Branch of the Royal Military Police] was not, at the relevant period, operationally independent from the military chain of command”. See also *The Queen (Application of Ali Zaki Mousa) v. Secretary of State for Defence* [2011] EWCA Civ1334 (Admin). See the House of Lords and House of Commons Joint Committee on Human Rights, *Legislative Scrutiny: the Armed Forces Bill*, 12th Report of Session 2010-2012, HL Paper 145 (May 17, 2011), at para. 1.15; available at: www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/145/14502.htm.

203 Clause 5 adding a new section to the Armed Forces Act 2006. See the similar position of the Director of Service Prosecutions, discussed at para. 3.19 above. Prior to the 2006 Act the Director of Army Legal Services was appointed by Her Majesty the Queen as Director of Army Prosecutions, with similar provisions applying to the other legal branches. Appointment by HM the Queen provides actual and perceived independence from the Ministry of Defence. See also footnotes 166 and 171.

204 Clause 3.

205 Clause 4. Her Majesty’s Inspectors of Constabulary are responsible for the independent inspection from time to time of all civilian police forces in England and Wales.

and, subsequently, the Iraq Historic Allegations Team (IHAT). Lawyers on behalf of the claimants whose cases were to be considered by IHAT brought a civil action for judicial review of the decision of the Ministry of Defence not to establish another public inquiry in respect of these cases.²⁰⁶ The issue revolved around whether IHAT, as an investigatory body, was sufficiently independent for the purposes of Article 3 or whether such independence could be achieved only through the public inquiry route. The Court decided that IHAT was sufficiently independent of the Ministry of Defence and of the chain of command,²⁰⁷ with the result that a public inquiry was not necessary at this stage (although it might be in the future if, for example, IHAT's investigations show systemic abuse of detainees). The composition of IHAT comprises a civilian head (a retired senior civilian police officer), who reports directly to the Provost Marshal (Army), the head of the Royal Military Police. Those working under the head of IHAT are a combination of Royal Military Police officers and civilians. IHAT was stated to be 'separate from the chain of command'²⁰⁸ and that its 'investigation[s] can be expected to lead to prosecutions and/or disciplinary action in appropriate cases.'²⁰⁹

(k) *Do military investigating authorities act independently or are they*

206 *The Queen (Application of Ali Zaki Mousa) v. Secretary of State for Defence* [2010] EWHC 3304 (Admin). There are some 127 claimants, excluding those whose claims did, or will, form part of the Baha Mousa Inquiry or the Al Sweady Inquiry, *Id.*, para.8.

207 In relation to the Royal Military Police (RMP) investigators as members of IHAT the Court concluded that "they form no part of the operational unit under investigation and, although they remain servicemen, they are not subject to operational military discipline, and the structure within which they work insulates them from pressures that might compromise their independence", at para. 37. The RMP investigators are members of the Special Investigations Branch (SIB) and are not those who undertake General Police Duties (GPD) staff. For further distinction between these two types of member of the RMP see para. 3.05.

208 *The Queen (Application of Ali Zaki Mousa) v. Secretary of State for Defence* [2010] EWHC 3304 (Admin), para. 15. It has a staff of over 80, of which 31 are civilian investigating staff, *Id.*, at para. 19.

209 *Id.*, at para. 16. At the time of setting up IHAT another body, the Iraq Historic Allegations Panel (IHAP) was also established to consider the results of investigations by IHAT and any other cases with a 'view to identifying any wider issues which should be brought to the attention of any part of the Ministry [of Defence] and of Ministers personally,' para. 17. On further appeal in *Ali-Zaki Mousa*, the Court of Appeal disagreed (on the facts) with the decision of the High Court that IHAP was sufficiently independent of the RMP so as to satisfy the requirements of perceived independence of the inquiry contained in the procedural obligations of Article 3 of the Convention. It required the Secretary of State to re-consider how the UK should comply with Article 3, see [2011] EWCA Civ 1334.

subject to the direction of commanders, military legal officers, prosecutors or other actors?

3.46 It has been shown above that Royal Military Police (RMP) investigators are those from the Special Investigations Branch (SIB), ‘who are subject to discipline by the [Provost Marshal (Army)] PM (A), not the operational chain of command’ and that the PM(A) is responsible to the Army Board ‘for the conduct and direction of all RMP investigations, which are to be conducted independently of the chain of command’. Further, a Protocol between the PM(A) and the Army Prosecuting Authority, though not fully up to date, emphasises that “the RMP are independent of the Chain of Command and all other agencies when conducting investigations”²¹⁰.

3.47 For the changes proposed in the Armed Forces Bill 2011 to strengthen the independence from the chain of command of the RMP see para 3.44 above. The Army Prosecuting Authority (referred to in the quotation in para 3.46 above) has now been replaced by the Service Prosecutions Authority, headed by a senior civilian lawyer, the Director of Service Prosecutions (DSP). The DSP has a staff of Service prosecutors (who will be members of one of the Service legal branches) but who, in relation to their prosecution duties, will be responsible to the DSP.

(l) What is the role of the commander or other senior military personnel with regard to a possible LOAC violation? Are any limitations placed on their involvement? Do they shoulder any particular responsibilities?

3.48 It has also been shown above that a commanding officer must report an alleged offence which would be likely (in effect) to amount to a serious breach of LOAC to a Service police officer for investigation (see para 3.09

²¹⁰ *The Queen (Application of Ali Zaki Mousa) v. Secretary of State for Defence* [2010] EWHC 3304 (Admin), para. 37. The same paragraph of the Judgment refers also to Queen’s Regulations for the Army having been amended to require the Royal Military Police to act independently of the chain of command and “not to be subject to any undue influence prior to concluding their investigation”.

above).²¹¹ The investigation (and any influence he or she might possess) is taken out of the hands of the commanding officer. It is clearly impermissible for an officer in the chain of command at a rank higher than the commanding officer to involve him (or her) self in any particular case. Any attempt to do so would make any order he gave to a subordinate an unlawful command, which must not be obeyed, and would be likely to involve the commission by that officer of a crime or of a breach of discipline.²¹²

3.49 In theory, a breach of LOAC not involving an offence which must be reported to the Service police for investigation (such as an alleged breach of discipline but which did not amount to a criminal offence in England²¹³) would remain with the commanding officer to investigate and to decide whether to charge a subordinate with an offence against Service discipline. An appropriate investigation must be carried out if a reasonable commanding officer would take the view that a Service offence has (or may have) taken place. The investigation can be carried out by anyone within his command whom the commanding officer may direct. Detailed guidance is given for the carrying out of an investigation by Service personnel other than the Service police.²¹⁴

(m) *Is there civilian oversight over the military system and its various*

211 The Armed Forces Act 2006, set out in Schedule 2 the alleged offences for which the commanding officer has a duty to report to the Service police, who will then investigate. These include the following crimes under English law, a grave breach of the Geneva Conventions or of Additional Protocol I (Geneva Conventions Act 1957, as amended following the ratification by the UK of Additional Protocol I); the offences under sections 51, 52 of the International Criminal Court Act 2001 (genocide, crimes against humanity, war crimes).

212 The crime could be that of interfering with the course of justice. A disciplinary offence could be that of obstructing or failing to assist a Service policeman in the course of his duty, the Armed forces Act 2006, sections 42 and 27 respectively.

213 This could be a breach of LOAC which has not been implemented into English law but which could be dealt with as a Service offence, such as a contravention of standing orders or conduct prejudicial to good order and Service discipline, the Armed Forces Act 2006, sections 13, 19 respectively.

214 Sections 115, 120, Army Act 2006; the *Manual of Service Law*, JSP 380, Version 2 (2011) Vol. 1, Annex F. The commanding officer could, in the alternative, refer the case to the Director of Service Prosecutions. In *The Queen (Application of Ali Zaki Mousa) v. Secretary of State for Defence* [2010] EWHC 3304 (Admin), at para. 46, the Court concluded that “it is difficult to conceive of the commanding officer not referring the case in practice to the DSP [Director of Service Prosecutions]”; para. 65. See also footnote 161.

actors (e.g courts, civilian Attorney General)?

3.50 Yes. The civilian oversight of the military system comes in a number of forms. The Court Martial has a civilian judge, a judge advocate. The Court Martial Appeal Court (composed solely of civilian judges) hears appeals from the Court Martial. The Summary Appeal Court (with a civilian judge advocate as the judge) hears appeals from summary hearings conducted by commanding officers. Every five years the governing legislation of the armed forces must be renewed for a further five year period. In practice a House of Commons Select Committee is established on an *ad hoc* basis to hold hearings and to recommend any changes to the Bill, which is then debated in the normal way in Parliament. It is common for this Select Committee to enquire into the workings of the military justice system, especially if an issue has arisen since the previous armed forces legislation. It has been shown above (para 3.34) that the civilian Attorney General assumes a supervisory role in relation to the Service justice system. It has also been shown that the Ministry of Defence has decided to set up public inquiries where serious issues surrounding LOAC breaches have come to light. In these cases the Ministry will normally wait until any trials of soldiers have been completed.

4. APPLICATION OF THE POLICY IN PRACTICE

(a) If both the military and civilian systems enjoy competence over incidents involving possible LOAC violations, what criteria are used to determine which system handles the matter? Specifically, explain the interface between civilian and military systems in the investigation and prosecution of alleged breaches of LOAC.

4.01 It has been shown above (para 1.01) that any likely breach of LOAC will occur outside the UK. Whilst the civilian courts will have jurisdiction over some criminal offences committed extra-territorially (such as the offences under English law which would form the basis of a serious breach of LOAC) by members of the UK armed forces it is likely that jurisdiction would fall primarily upon the Service legal system. Any investigation would be conducted by the Service police and a decision whether to prosecute would be taken by the Director of Service Prosecutions.

4.02 In theory, an alleged breach of LOAC committed outside the UK would also give the courts of the territory on which the alleged breach occurred, jurisdiction over it. It is likely, however, that a status of forces agreement (or a memorandum of understanding) between the sending (UK) and the receiving States would provide for UK jurisdiction in some form or other. In the event that no status of forces agreement (or memorandum of agreement) was in place, such as where the UK is undertaking military action on that territorial State, it is extremely unlikely that the UK would hand one of its soldiers over to the territorial State for trial when it would have jurisdiction over him in any event.

4.03 An alleged breach of LOAC by a civilian could not be dealt with under Service law unless that civilian was, at the time of the alleged offence a person subject to Service discipline. Whether a civilian is subject to Service discipline was discussed at para 3.13 above. A civilian, who is not subject

to Service discipline, could only be tried by a UK court if the alleged offence carried extra-territorial jurisdiction. The most serious breaches of LOAC do so. Thus, a civilian could be tried in the UK for a grave breach of the Geneva Conventions 1947 or of additional Protocol I or (if he was a UK national resident) a crime within the International Criminal Court Act 2001 of genocide, crimes against humanity, war crimes. Any investigations would have to be carried out by the civilian police.

4.04 Where an alleged breach of LOAC by a person subject to Service law occurs within the UK both the civilian and the Service legal systems will have jurisdiction.²¹⁵ This potential conflict of jurisdiction is generally resolved by determining whether the victim of a crime in England or his or her property is civilian. If that is the case the crime would normally be tried in the civilian courts.²¹⁶

(b) What are the reporting requirements regarding allegations of wrongdoing (e.g. are allegations reported, to what authority and in what time period)?

4.05 Once a commanding officer becomes aware of an alleged breach of LOAC he must ‘as soon as is reasonably practicable ensure that a service police force is aware of the matter.’²¹⁷ Once the Service policeman ‘considers that there is sufficient evidence to charge a person with a Schedule 2 offence... he must refer the case to the Director of Service Prosecutions.’²¹⁸

215 Prior to the Armed Forces Act 2006 a court-martial did not have jurisdiction to try a person subject to military law for the crimes of murder, manslaughter or a grave breach of the Geneva Conventions Act 1957 if alleged to have been committed in the UK, Army Act 1955, s 70(4).

216 See www.publications.parliament.uk/pa/cm201011/cmselect/cmarmed/779/779we22.htm, for discussion of this issue in written evidence produced by the Ministry of defence to the Select Committee on the Armed Forces Bill 2011.

217 Armed Forces Act 2006, s 113; The Service police comprise the Royal Military Police, the Royal Navy Police and the Royal Air Force Police.

218 *Id.*, at s 116; The Iraq Historic Allegations Team (IHAT, as to which see para. 3.45 above) was set up within the requirements of the Armed Forces Act 2006 so as to use the procedural steps within the Act in order to bring charges against individuals subject to Service law. A Schedule 2 offence (see para. 3.09 above) includes a grave breach of the Geneva Conventions 1949 and of Additional Protocol I; a crime under the International Criminal Court Act 2001, section 51 or 52 (genocide, crimes against

It will be recalled that it will be the decision of the Director of Service Prosecutions as to whether any charges should be brought.

4.06 A person subject to Service law could be charged with the Service offence of conduct to the prejudice of good order and service discipline in failing to report a breach of Service law since an act includes an omission.²¹⁹ An example of such a charge being brought was in what became known as the ‘Operation Bread Basket’ court-martial.²²⁰

(c) Can complaints of alleged LOAC violations be made directly to the military or civilian police?

4.07 Yes. They can be made by anyone, whether a member of the armed forces or a civilian. A complaint to a Service policeman may lead to the arrest by him of a person reasonably suspected of committing a LOAC violation. Once the investigation by the Service police reaches the stage where it is considered that ‘there is sufficient evidence to charge a person with a Schedule 2 offence’²²¹ the case must be referred to the Director of Service Prosecutions.

4.08 Where the alleged breach of LOAC occurs outside the UK a complaint made to the civil police could lead to the civilian criminal legal system coming into operation if it has jurisdiction over the suspect. The issue of the extra-territorial jurisdiction of English criminal law is discussed above at para 1.41ff. Should the alleged offence have been committed in the UK

humanity or war crimes).

219 Armed Forces Act 2006, s 19; The higher the rank of the individual Serviceman or woman who observes or otherwise becomes aware of a service offence the more likely a charge under s 19 would become appropriate.

220 The case is not reported in a law report. It involved the court-martial (under the predecessor to the Armed Forces Act 2006) of a number of British soldiers for various forms of ill-treatment of Iraqi civilians detained temporarily after alleged attempts to steal humanitarian aid stored on a British base. For a report see www.timesonline.co.uk/tol/news/world/iraq/article510001.ece.

221 Armed Forces Act 2006, s 116; A Schedule 2 offence is a serious offence which will include the serious LOAC breaches (see para. 3.09 above).

those courts will have jurisdiction on the basis that the relevant rule of LOAC has been incorporated into English law.²²²

(d) If there is an allegation of a LOAC violation by military personnel, what is the policy regarding investigation? Who decides whether there will be an operational inquiry (e.g. by unit personnel) or criminal investigation?

4.09 It has been shown above that the commanding officer has a duty to ensure that the Service police become aware of the possibility that a serious offence (a Schedule 2 offence) may have been committed.²²³ It will then be for the Service police to investigate and to refer any case where there is considered to be sufficient evidence to charge a person with a Schedule 2 offence to the Director of Service Prosecutions.²²⁴

4.10 The result of the above is that both the decision to investigate and the decision as to whether to prosecute a Serviceman or woman are taken out of the hands of anyone (at unit level or above) in the chain of command. The independence from the chain of command of both the Service police and the Director of Service Prosecutions is discussed above.²²⁵ Where no prosecution is to be brought, or where any such processes have been completed, it is quite possible that officers within the chain of command will attempt to learn lessons from particular episodes. An example is the Aitken Report referred to at para 1.36 above.

(e) Regarding such investigations, what criteria apply as to when an investigation (or other inquiry) must be launched (e.g. reasonable suspicion / belief of commission of an offence)?

²²² The most likely offences to be charged, a grave breach of the Geneva Conventions 1949 or of Additional Protocol I; any of the offences set out in the International Criminal Court Act 2001, sections 51, 52 (genocide, crimes against humanity, war crimes) are all specific crimes under English law.

²²³ Armed Forces Act 2006, s 113.

²²⁴ *Id.*, at s 116.

²²⁵ For the independence of the Service police see para. 3.20 above and for the Director of Service Prosecutions see para. 3.32 above.

4.11 See para 4.09 above. A commanding officer's duty to report a matter to the Service police arises where he or she 'becomes aware of an allegation or circumstances... if it or they would indicate to a reasonable person that a Schedule 2 offence has or may have been committed.'²²⁶ He or she must inform the Service police 'as soon as is reasonably practicable.'²²⁷

(f) If an operational investigation or other inquiry is directed by the chain of command, is there a requirement to refer the matter for criminal investigation should it appear that a crime may have been committed? If so, under what circumstances?

4.12 Yes. See the obligation of the commanding officer discussed in paras 4.09-4.11 above. The pivotal role played by the commanding officer in the British armed forces is recognised by the Armed Forces Act 2006. Thus, a Service policeman is under a duty to inform an individual's commanding officer if he (the Service policeman) refers a case to the Director of Service Prosecutions.²²⁸ Should an investigation be held by officers higher up the chain than the commanding officer it is likely that if facts arise which would suggest that a breach of LOAC has occurred the individual's commanding officer would be informed. His duty would then be to inform the Service police as indicated in paras 4.09-4.11 above.

(g) Under what circumstances must an investigation or inquiry be conducted in cases involving civilian death or injury or damage to civilian property? Is there a requirement that every death or every civilian death be investigated? Is the requirement one of law or policy? Does it extend to cases in which a military objective is attacked and collateral damage or incidental injury occurs?

²²⁶ Armed Forces Act 2006, s 113.

²²⁷ *Id.*

²²⁸ *Id.*, at s 118.

4.13 There is a legal requirement to investigate every death caused by State agents (in this case the armed forces) if there is an arguable case that the death was caused through a breach of Article 2²²⁹ of the European Convention on Human Rights, where the deceased immediately prior to his death was ‘within the jurisdiction’²³⁰ of the UK. A person can be ‘within the jurisdiction’ of the UK if, for instance, he or she is within a British military base abroad, perhaps as a detainee. A person will also be ‘within the jurisdiction’ of the UK if British armed forces are engaged in combat with him outside the UK in the circumstances referred to by *Al-Skeini v United Kingdom*, Application No 55721/07 (Judgment of the Grand Chamber, 7 July 2011) and discussed in para 1.25 above. In these circumstances there will be a legal requirement to hold an Article 2 investigation. On the other hand an Article 2 investigation will not be required where the armed forces of the UK are engaged in combat abroad but where they have not been able to establish sufficient control over that territory to impose on them the obligations of the European Convention on Human Rights through Article 1 of that Convention (see further, para 1.25 above).

4.14 The death of a British soldier abroad will be conducted by a coroner in the UK when his or her body is repatriated to the UK. An investigation by the coroner will have to comply with the requirements of the European Convention on Human Rights should there be an arguable case that the death was caused through a breach of Article 2 of the Convention. The issue of whether the UK owed a duty under Article 2 (the right to life) to its own soldiers whilst they were off base taking part in military operations was considered by the UK Supreme Court in *Smith*.²³¹ The Court concluded (by a majority) that right to life owed by the State to its soldiers applied whilst they were on a military base and not whilst engaged in military

229 See para. 1.26 above.

230 Article 1 of the European Convention on Human Rights 1950, paras. 1.24-1.26 above.

231 *R (on the application of Smith) (FC) v. Secretary of State for Defence* [2010] UKSC 29, available at: www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0103_Judgment.pdf. See para. 1.28 above. For discussion of this case in the light of *Al-Skeini v. United Kingdom*, Application No 55721/07, Judgment of the Grand Chamber (Jul. 7, 2011) see footnote 61 above.

operations off the base. Should there be an arguable case that the UK was in breach of Article 2 to one of its soldiers (as applied in the *Smith* case) the coroner's inquest (when the body is returned to the UK) must take a particular form.

4.15 There is no legal requirement to hold an investigation where damage to civilian property occurs outside the UK unless a status of forces agreement provides a procedure to investigate and compensate, in an appropriate case, civilians for damage caused by UK armed forces. It is, however, likely that in the absence of a status of forces agreement and where the UK is carrying out military operations on the territory of another State with its consent that compensation will be paid as a matter of policy.

4.16 There is no legal requirement under UK law to pay compensation for damage caused during the course of military operations abroad²³² should the damage be caused as a result of activities permitted by LOAC. Although there are obligations to pay compensation for the activities of a State's armed forces where there is a breach of the Geneva Conventions or of Additional Protocol I²³³ this requirement has not been specifically implemented into the law of the UK.

(h) *What access do affected civilians, including non-citizens and residents of other countries, have to the investigation, its results and any prosecution?*

4.17 It is a requirement of an Article 2 or of an Article 3 investigation that

²³² War Damage Act 1965, "no person shall be entitled at common law to receive from the Crown compensation in respect of damage to, or destruction of, property caused (whether within or outside the UK) by acts lawfully done by, or on the authority of, the Crown during... a war in which the Sovereign was, or is engaged"; Compare the position if a statute so provides or where the Crown offers compensation on an *ex gratia* basis. Both terms, the 'Crown' and the 'Sovereign' in this context refer to the UK Government. It is not clear whether the term 'war' includes an armed conflict or only a declared war. The situation referred to in the 1965 Act is to be distinguished from one where soldiers commit a tort, as to which see footnote 234 below and para. 1.03 above. Charitable donations were made by senior British officers to the relatives of some Iraqi civilians killed by British soldiers in Iraq. These were administered by the British Army Goodwill Payments Committee, as to which see *Al-Skeini v. United Kingdom*, Application No 55721/07 (Jul. 7, 2011), paras. 38, 42, 52.

²³³ Additional Protocol I, 1977, Art 91. See also Hague Convention (IV) 1907, Art 3.

the next of kin of those allegedly killed by State agents should have access to the investigation process (see para 1.26 above). Within the UK there will be little difficulty since an inquest carried out by a coroner into a death will be held in public. Similarly, court proceedings will be open to the public, including a trial by the Court Martial.

4.18 An Article 2 or an Article 3 investigation carried out by the UK during the course of military operations abroad may cause security difficulties since they will inevitably be conducted on a military base. Nevertheless, the requirements of investigation under either of these two Articles must be met and any necessary arrangements will have to be made. During the Iraq operation by UK armed forces the practice has been to hold trials of British soldiers within the UK. An inevitable consequence of this is that unless Iraqi civilians were called as witnesses at the various trials it is unlikely that other Iraqis civilians would have been able to attend any of them.

4.19 The effect of the Human Rights Act 1998 during the course of military operations abroad and the consequences in English law are discussed in sub-heading (i) below.

(i) What role, if any, do human rights groups have in the initiation or conduct of any inquiry into alleged LOAC violations?

4.20 Experience shows that since the implementation into English law of the rights and obligations under the European Convention on Human Rights by the Human Rights Act 1998 some civilian lawyers have travelled to Iraq to advise potential clients. It has first been necessary to show that the facts of any claims against the British Army occurred whilst the individual was ‘within the jurisdiction’ of the UK. Secondly, the most significant remedy²³⁴ sought has been an investigation under Article 3 of

²³⁴ Claims for compensation have also been brought. These will, broadly, be on the basis that under the

the Convention, where there is an arguable case of torture, inhuman or degrading treatment having been caused by British armed forces during periods of detention.

4.21 As a result of the direct applicability of the European Convention on Human Rights into English law by the 1998 Act applicable to those ‘within the jurisdiction’ of the UK there has, in practice, been little scope for human rights organisations to initiate or suggest the most appropriate way to conduct an inquiry. That is not to say that human rights organisations have had no influence. See, for example, the following evidence submitted to the Baha Mousa Inquiry by REDRESS, available at: www.redress.org/downloads/publications/Submission_for_Baha_Mousa_Inquiry_13_September2010.pdf. The nature of the conflicts in Iraq (during and after the occupation) and in Afghanistan have been such that British armed forces have carried out patrols with local interpreters. One of the functions of these patrols is (or has been) to ‘win the hearts and minds’ of the local population. To do this it is recognised that compensation should be paid quickly for any damage caused by British armed forces. The British Army Goodwill Payments scheme is referred to in footnote 232.

(j) Please provide available statistics regarding the investigation (or other inquiries) and prosecution of alleged LOAC violations (e.g. numbers of complaints, matters investigated, charges laid, non-judicial action, trials, verdicts-include civil and military.

Human Rights Act 1998, s 6 “It is unlawful for a public authority [e.g. the armed forces] to act in a way which is incompatible with a Convention right” [to those within the jurisdiction of the UK-which can include persons abroad detained by UK armed forces, as shown above]. In discussing the work of the Iraq Historic Allegations Team [IHAT], the Court in *The Queen (Application of Ali Zaki Mousa) v. Secretary of State for Defence* [2010] EWHC 3304 (Admin), para. 16 stated that “The work of investigation will also feed into existing civil proceedings, not only by facilitating the disclosure exercise where cases are fought but also by enabling settlements to be agreed where appropriate”. Following the decision of the Court of Appeal in this case (at [2011] EWCA civ 1334) it will be for the Government to decide what other mechanism to employ for the purposes of investigation (which may then lead to further prosecutions of soldiers). The work of the Joint Select Committee on Human Rights (a body composed of representatives of both Houses of Parliament) has also been effective in probing the activities of the Government. For a link to the Committee see www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee.

4.22 The Aitken Report, *An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004*, (Ministry of Defence, UK, 2008)²³⁵ indicates that ‘since the invasion of Iraq in 2003, over 120,000 members of the armed forces have served in the region. To date [2008] 229 allegations of criminal²³⁶ activity have been investigated by the Service Police, 20 of which have been dealt with either by court martial or by summary dealing within the chain of command.’

4.23 The Aitken Report also shows²³⁷ that between 2003 and 2004 there were six separate incidents investigated which led either to court-martial trial or to summary dealing by the commanding officer. The court martial trials of British soldiers related to the following Iraqi individuals or incidents: Mr Kareen, court-martial, soldiers found not guilty; Mr Abdullah, court-martial, soldiers acquitted; Breadbasket Camp,²³⁸ court-martial four soldiers found guilty by court-martial; Mr Shabra, investigations, no charge; Mr Baha Mousa, court-martial of a number of soldiers, one convicted [the *Payne Case*²³⁹]; Al-Amarah Riot, no disciplinary or administrative action.²⁴⁰

(k) *Have senior military or security service personnel or senior government officials been investigated or prosecuted for possible LOAC violations, or responsibility for such violations (e.g. by ordering, approving, tolerating, covering up violations)?*

4.24 One former commanding officer (a Lieutenant Colonel when the

235 At p. 2. See para. 1.36, which also includes a URL for the Report.

236 Choice of the word ‘criminal’ shows that, as indicated above, proceedings against British soldiers will be based on the criminal law of England. As shown above a breach of LOAC which is not a criminal offence under English law would have to be charged as a general offence under Service law, if a suitable charge under that law was available. Strictly, Aitken should have used the phrase ‘criminal activity or breach of Service law’.

237 At p.3.

238 For discussion see para. 4.06.

239 For discussion of this case see para. 1.21.

240 Details of a number of the cases are also given in the REDRESS Report, *UK Army in Iraq: Time to Come Clean on Civilian Torture*, 3-16 (2007), available at: www.redress.org/downloads/publications/UK_ARMY_IN_IRAQ_-_TIME_TO_COME_CLEAN_ON_CIVILIAN_TORTURE_Oct%2007.pdf.

facts occurred but subsequently at Colonel rank) was prosecuted, along with a Major in the *Payne* case (discussed in para 1.21 above). Neither was charged directly with a LOAC offence but with the military offence of negligent performance of a duty. Both were acquitted. Conclusions drawn by the Baha Mousa Inquiry report against these two officers are discussed at para 4.28.

4.25 A civil action (by way of judicial review) was brought in the case of *R (Gentle) v Prime Minister* [2008] UKHL 20 seeking judicial review of the refusal of the Secretary of State to hold a public inquiry into ‘whether the UK had taken reasonable steps to be satisfied that the invasion of Iraq was lawful under principles of international law’. The Court held that there was no requirement for a public inquiry since the claimants (whose sons had been killed during military action in Iraq) would have to show an ‘arguable case that the substantive duty [to protect the right to life under Article 2 of the European Convention of Human Rights] arose on the facts of the case.’

4.26 There was an allegation that a member of the security services was complicit in the alleged torture of a British resident by the Pakistan security forces but no proceedings were commenced.²⁴¹

(l) *What, if any, examples are available concerning investigations or other inquiries of alleged LOAC violations regarding the following types of incidents (indicate their outcome).*

1. *Theft/assault or alleged mistreatment of civilians (not taking a direct*

²⁴¹ For further discussion see para. 2.18 above. Evidence obtained from torture whether committed in the UK or abroad will not be admissible against a person in a court in England, *A and others v. Secretary of State for the Home Department (No 2)* [2005] UKHL 71; A senior Minister informed the Joint Select Committee on Human Rights (a committee of both Houses of Parliament) that “the Government, including the intelligence and security agencies, never uses torture for any purpose, including to obtain information, nor would it instigate others to do so”, Thirteenth Report, Session 2005-2006, Appendix.

part in hostilities).

4.27 See below.

2. *Mistreatment of detainees including during interrogation.*

4.28 Virtually all the cases resulting in the prosecution of British soldiers arising from military operations in Iraq have involved the ill-treatment of detainees. The cases are detailed in the Aitken Report (para 1.36 above); the REDRESS Report (footnote 240) and the Baha Mousa Inquiry Report (see para 1.21 above). The main recommendations of the Baha Mousa Report, which was concerned with the circumstances surrounding the death of Mr Baha Mousa whilst he was detained by British soldiers in Iraq, relate to this incident. The so-called ‘five techniques’ had been prohibited ‘as an aid to interrogation’ by a statement made by the Prime Minister in Parliament on 2 March 1972 (Hansard, House of Commons, Vol 832, cols 743-9). These were ‘hooding, the use of white or background noise, sleep deprivation, wall-standing (a form of stress position) and a limited diet’ (Report, p. 1324). The prohibition of these five techniques had not, however, been incorporated into policy to be followed on the ground. Baha Mousa, and those detained with him at a temporary detention facility, had been subjected to hooding for long periods of time where the ambient temperature was very high. They had also been placed in stress positions, handcuffed, prevented from sleeping and had been assaulted by ‘their guards’ (Report, p. 1296). During the course of this treatment Baha Mousa died. The Report recommended that the hooding (by way of a sandbag or other covering over the head) of captured personnel should be absolutely prohibited. The Report concluded that ‘it is difficult to conceive how a return to the use of hoods could be justified whether militarily, legally or as a matter of policy’ (p. 1267). It did, however, recognise that sight deprivation could be used ‘for as long as it is strictly necessary... but that it should never become routine,’ (Report, pp. 1268-9). The Report went on

to recommend that standing orders should prohibit the use of the five techniques. It would be an offence against Service law to contravene these (and other) standing orders (s.13 Armed Forces Act 2006). In relation to other acts carried out during detention the Report recommended that stress positions (as properly defined) should never be used, nor should it be permissible 'deliberately to increase the noise in the vicinity of [a detained person] even for security purposes,' (Report p. 1268). Further detailed guidance was given by the Report on the treatment of detainees (including a medical examination within four hours of detention) and the completion of proper records as to specific incidents in their individual treatment. The Report found that the commanding officer 'ought to have known what was happening in the [temporary detention facility]' (p. 1323) and that the battalion internment review officer (a Major) 'must have understood the adverse effects of hooding and stress positions in the significant heat for a period of around 36 hours,' (p. 1305). There was a failure to report what had been seen at the temporary detention facility by this Major, the padre (p. 1303) and the senior medical officer of the battalion (p. 1314). During the course of the Inquiry it had become clear that the prohibition in 1972 of the 'five techniques' had not found its way into the relevant policy documents, although attempts to do this had been made in 'fragmentary orders'. The Report recommended that 'The [Ministry of Defence] should continue its recent practice of ensuring that theatre level instructions and procedures for [detained persons] are contained within a single comprehensive order that is kept up to date and which can be easily handed over to incoming formations in enduring operations. It is inappropriate to permit [detainee] handling to be governed by a series of fragmentary orders that may be lost or confused in the roulement of formations and units,' (p. 1277). It also recommends that '[detainee handling] training should be woven into the full range of military exercises and training,' (Report, p. 1279) and that training materials are 'clear and consistent' (p. 1280). The Government accepted all the recommendations of the Report (except Recommendation 23 (harsh approach to tactical questioning), Hansard, House of Commons,

8 September 2011, col 571.

3. *Use of force while assisting in the maintenance of law and order (either directly or in support of police forces) in occupied territories.*

4.29 See the case of Trooper Williams, who was charged with murder in killing an Iraqi civilian. He was acquitted by a civilian court in London. See <http://news.bbc.co.uk/1/hi/uk/4420051.stm> (see para. 1.07 above).

See also the facts of *Bici v Ministry of Defence* [2004] EWHC 786 (QB)²⁴² (para 1.03 above). This case involved three British soldiers, who were part of a UN peacekeeping mission in Kosovo. They shot and killed two civilians and injured a third while acting in the course of their duties.

See also the Northern Ireland cases at para 1.23 above. Although no armed conflict was admitted to be taking place the principles applied in those cases would be the same had they taken place in the circumstances covered by this paragraph. The case of Trooper Williams was based on the same principles (honest belief that soldier was acting to save himself or a fellow soldier).

4. *Use of force while seeking to arrest or detain a civilian taking a direct part in hostilities*

4.30 The issue here is likely to turn on whether the civilian was actually taking a direct part in hostilities. If so, a British soldier would be permitted both by English law and by his rules of engagement to open fire. The difficulty arises when the soldier believes, mistakenly, that the civilian was taking a direct part in hostilities but where it transpired that he or she was not doing so. Then the issue becomes one of the honesty of his belief. See the facts of Trooper Williams case at para 4.29 above. This issue arose

²⁴² Available at: www.bailii.org/ew/cases/EWHC/QB/2004/786.html.

in the Northern Ireland cases as the most likely cause of the shooting of innocent civilians.

5. *Use of force at a checkpoint or during a similar operation*

4.31 See for example, the facts of *R v Clegg*, footnote 51. See also *Lynch v Ministry of Defence* [1985] 6 NIJB (a Northern Ireland case) ‘firing at the tyres might well be ineffective to stop the vehicle, and in any event, if the soldiers were not permitted to fire at the driver of the car, the driver might often escape from a foot patrol with any weapons or explosives which he might be carrying, even if the car were eventually stopped by bullets striking a tyre or tyres.’²⁴³

6. *The targeting of civilians taking a direct part in hostilities*

4.32 See the answer given in para 4.30.

7. *Use of force against a member of an organized group or terrorist organization in the context of an armed conflict.*

4.33 See the answer given in para 4.30.

8. *Use of force against enemy which resulted in collateral civilian casualties.*

4.34 No prosecution has been brought against members of British armed forces for such action. See, however, the *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*.²⁴⁴ This recommended that no

²⁴³ Hutton J.

²⁴⁴ Available at: www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf.

investigation be launched by the Office of the Prosecutor into the NATO bombing campaign in Kosovo in 1999.

An application was brought against members States of NATO under the European Convention on Human Rights by relatives of a number of civilians who had been killed when a TV studio was bombed in Belgrade in 1999. The European Court of Human Rights declared the case to be inadmissible in *Bankovic v Belgium* [and other NATO States party to the Convention]. The case is mentioned at para 1.24 above.

9. *Any other relevant case.*

4.35 None.

(m) *Is there any other information which you would like to bring to the attention of the Commission?*

4.36 Except, possibly, in the most blatant example of the ill-treatment of a detainee the decision to prosecute a soldier for acts carried out in the course of his duty should be recognised as a difficult one. In modern armed conflicts the separation between combatants and civilians is not clearly drawn. Mistakes will be made and innocent civilians will be killed as a result. Soldiers will frequently have to make decisions on whether to open fire or not in a 'split second'. If the rule of law, and thereby the maintenance of discipline, are considered to be essential in any democratic State, soldiers are going to have to accept that independent investigations and trials will take place from time to time. Note the following comments in Parliament by a former Chief of the Defence Staff and the Attorney General respectively. It will be noted that the comments were made by each on separate occasions and that one should not necessarily be taken as a response to the other.

LORD BRAMALL (A FORMER CHIEF OF THE DEFENCE STAFF):

I am talking particularly about ongoing operations in Iraq, in which there is no distinction between war zones and civilian areas and little distinction between terrorists and law-abiding civilians.

In those circumstances, if there is evidence of hostile elements and hostile intent in the area, the soldier often has to decide instantly whether, to safeguard his life and the lives of his comrades, he needs to open fire or can safely show more restraint. That judgment can only be taken on the spot by soldiers relying on their professional judgment and sometimes on the innate decency of the British soldier. It should only be reviewed, justified or condemned, if further investigation becomes necessary, by those familiar with similar situations and aware of the environment and the pressures prevailing at the time and able to make a judgment on whether the soldier has acted in good faith and therefore deserves the benefit of any doubt that there may be.

Rules of engagement and yellow cards help, but the troubling thing about the case of Trooper Williams, who had shot an Iraqi who was clearly connected with terrorism and who had ignored a warning shot, was that commanding officer had dismissed the case just because he was satisfied that the rules of engagement had been met. That still did not stop interference with the chain of command at a level remote from the action and by those influenced by political pressures and adverse publicity.²⁴⁵

245 *Hansard*, House of Lords, vol. 673, col. 1226 (Jul. 14, 2005).

THE ATTORNEY GENERAL:

‘...[w]hen it comes to the activities of the Army Prosecuting Authority[now the Service Prosecuting Authority], they have an obligation, like any other prosecutor, to bring prosecutions, however uncomfortable that might be for the Army or for the Government or for the country, in circumstances where there is credible evidence of wrongdoing, breaches of our criminal law, breaches of the treatment, that soldiers are required to comply with, and I entirely support them in that. Indeed – one of the things you might think was extraordinary about the suggestions in relation to what I might have said – I, above all people, have been more criticised for allowing these prosecutions to take place than anybody else in this country. I have allowed these prosecutions to take place precisely because my view is that the rule of law does need to be complied with. If there is credible evidence that soldiers – and I believe it is only a very small number out of a huge number of our soldiers who fought and acted in a very, very courageous and brave way – have broken the law then it is important that that should be brought to a court to be tested.’²⁴⁶

4.37 A further issue has been whether, following a UN Security Council resolution, UK armed forces operating abroad in line with that resolution are acting as agents of the UN or as State agents. The significance of holding that UK [or other State] armed forces are acting as agents of the UN is that no application can be made to the European Court of Human Rights since the UN is not, of course, a party to the European Convention on Human Rights. The UK Government argued in both *Al-Skeini v United Kingdom*, Application No 55721/07, Judgment of the Grand Chamber, 7 July 2011 and in *Al-Jedda v United Kingdom*, Application No 27021/08, Judgment of the Grand Chamber, 7 July 2011 that UK armed forces were not ‘exercising the sovereign authority of the United Kingdom but the internal authority of the Multi National Force acting pursuant to the binding decision of the

²⁴⁶ Joint Select Joint Committee on Human Rights, Evidence, 26 June 2007, Q 220, Session 2006-2007.

United Nations Security Council.²⁴⁷ The Grand Chamber rejected this argument.²⁴⁸ Consequently, the acts of British soldiers were the acts of the UK and the European Court of Human Rights had jurisdiction to determine whether there had been a breach of the Convention in respect of civilians who were held to be ‘within the jurisdiction’ of the UK in Iraq.

4.38 Finally, it had been held by the House of Lords in *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58 that a binding decision of the United Nations Security Council could bring into operation Article 103 of the United Nations Charter 1945. This Article provides that ‘in the event of a conflict between the obligations of [a Member State] under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’ The binding decision of the UN Security Council in this case was Resolution 1546, which *inter alia*, gave a power to the MNF to intern. The House of Lords held that this power in the Resolution to intern was ‘in conflict with’ the European Convention on Human Rights and the latter had to give way to the authority of the Resolution. The Grand Chamber in *Al-Jedda v United Kingdom* (2011) decided that this was not the case and that, consequently, the Convention applied to the detention of Mr Al-Jedda by British armed forces in Iraq.

The Armed Forces Act 2006 is *available at*: www.legislation.gov.uk/ukpga/2006/52/contents.

²⁴⁷ *Al-Skeini v. United Kingdom* (2011), at para. 97.

²⁴⁸ Compare its earlier decision in *Behrami v. France; Saramati v. France, Germany, Norway*, Application Nos 71412/01; 78166/01, Judgment of the Grand Chamber (May 2, 2007) (the relevant States were acting on behalf of the UN through KFOR).

INVESTIGATION AND PROSECUTION OF VIOLATIONS OF THE LAW OF ARMED CONFLICT IN GERMANY

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The purpose of the present study is to provide a description of the German system for investigating and prosecuting alleged violations of the law of armed conflict and war crimes.

The study describes the law and the legal principles that are applied to the investigation and inquiry of alleged violations of the law of armed conflict and war crimes. It focuses on the investigation by the military and the civilian system.

At the outset the study will give an overview of the applicable law. This will be followed by a description of the procedure of investigation and prosecution of alleged crimes. A second emphasis is put on the substantive criminal law regarding violations of the law of armed conflict. Finally, the report will give a comprehensive overview of existing case law.

A. APPLICABLE LAW

I. INTRODUCTION: THE GERMAN LEGAL ORDER

1. The German legal order is a civil law system. Constitutional law provides that criminal law must be enacted by parliament and cannot be found in customary or unwritten law. The law applicable to the questions

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of investigation and prosecution of violations of the law of armed conflict is therefore regulated exclusively in legislative acts. Due to the recent reform in the law, case law is rather scarce.

2. German law provides several procedural and substantive regulations that focus on the investigation and prosecution of war crimes and other crimes against international law. These are scattered among different acts of legislation. A detailed description is given in Chapter B.

3. Germany is a federal state. As a basic rule the federal states (*Länder*) and their parliaments are empowered to enact legislation, art. 70 et seq. of the German Basic Law (*Grundgesetz*, in the following also quoted as: GG). The federal government (*Bund*) is only competent to legislate as long and as far as the federal states have not enacted any legislation or as far as the German constitution, the *Grundgesetz*, empowers the federal parliament to enact legislation. For the matters of “criminal law, court organisation and procedure” art. 74 (1) No. 1 GG establishes concurrent legislative powers between *Bund* (the Federation) and *Länder* (the federal states), i.e. the *Länder* have power to legislate as long as, and to the extent that, the Federation has not exercised its legislative power. Therefore, the Federation is entitled to enact legislation regarding war crimes. The investigation and prosecution of alleged war crimes is a matter for the federal authorities.

II. THE IMPACT OF THE ROME STATUTE AND THE ENACTMENT OF SPECIAL LEGISLATION REGARDING WAR CRIMES 2002

4. Germany is a state party to the Rome Statute of the International Criminal Court since the end of 2000.¹ The entry into force of the Rome Statute has had a considerable impact on German criminal law.² Lawmakers reformed the existing law and have enacted special legislation in order to

1 Federal Gazette (BGBl.) 2000 II, at 1394.

2 Cf. only Gerhard Werle, *Einleitung in das VStGB*, mn. 1, in 6(2) MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH [MüKo zum StGB] (2009) (hereinafter: *Werle, Einleitung*).

regulate the investigation and prosecution of alleged violations of the law of armed conflict and of alleged war crimes. Today's national law, which stems from the year 2002, pertains to substantial as well as to procedural law. The reform was made in order to prepare the German legal order for the entry into force of the ICC-Statute.

5. As can be seen from this fact alone, the entry into force of the Rome Statute has had far-reaching impact on the investigation and prosecution of violations of the law of armed conflict in Germany. The influence is not limited to the mere enactment of new legislation but has changed the respective law significantly.

6. Prior to the year 2002 war crimes as well as crimes against humanity were not punishable *as such*.³ Criminal violations could only be measured against "regular" criminal law. As a consequence, most of the acts covered by war crimes or crimes against humanity were punishable as ordinary criminal offences in Germany before 2002, but the specific legal wrong (*Unrechtsgehalt*) was not reflected in the law.⁴ For instance, a wilful killing in an armed conflict was punishable as "murder" or "homicide", but the fact that it was committed during an armed conflict was of no significance.

7. In order to establish war crimes, the German parliament passed the Code of Crimes against International Law (*Völkerstrafgesetzbuch*, VStGB) on 26 June 2002. Reasons for the enactment were:

- the preparation of the German legal order for the entry into force of the ICC-Statute by aligning the German material

3 ALBIN ESER, ULRICH SIEBER & HELMUT KREICKER, *NATIONALE STRAFVERFOLGUNG VÖLKERRECHTLICHER VERBRECHEN* Band I: Deutschland 61 et seq. (2004) (hereinafter: ESER, SIEBER & KREICKER, *NATIONALE STRAFVERFOLGUNG*); Werle, *Einleitung*, *supra* note 2, at mn. 20.

4 Werle, *Einleitung*, *supra* note 2, at mn. 27 et seq.; CLAUS KREß, *VOM NUTZEN EINES DEUTSCHEN VÖLKERSTRAFGESETZBUCHS* 4 (2000); Peter Wilkitzki, *Die völkerrechtlichen Verbrechen und das staatliche Strafrecht (Bundesrepublik Deutschland)*, 99 ZStW 455 (1987).

criminal law with the ICC-Statute and general IHL,⁵

- to highlight the fact that German policy supports international criminal law and the ICC,⁶
- to facilitate the international implementation of the ICC-Statute by giving an example to other states on how the ICC-Statute can be implemented,⁷
- to extend the principle of universality⁸ and
- to fulfil Germany's obligations under IHL.⁹

8. The Federal Parliament (*Bundestag*) also enacted changes to the court structure in the Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG) and to procedural law in the Code of Criminal Procedure (*Strafprozessordnung*, StPO).

9. Besides these recent acts other legislation remains applicable and relevant to the investigation and prosecution of war crimes in Germany: especially German military law (*Soldatengesetz*, Code of Law for Members of Armed Forces and *Wehrdisziplinarordnung*, Military Disciplinary Regulation).

10. It needs to be emphasized that the latter codes do not regulate the conduct of hostilities. If a breach of the law of armed conflict is committed, it will be regarded as a war crime. The malfeasance, which is

5 BT-Drs. 14/2682, at 7; former Federal Minister of Justice H. Däubler-Gmelin, *Geleitwort*, in MATERIALIEN ZUM VStGB (S. R. Lüder & Th. Vornbaum eds., 2002) (hereinafter: *Däubler-Gmelin, Geleitwort*); Bundesratsdrucksache 29/02 (Jan. 8, 2002); ESER, SIEBER & KREICKER, NATIONALE STRAFVERFOLGUNG, *supra* note 3, at 52; Werle, *Einleitung*, *supra* note 2, at mn. 28.

6 ESER, SIEBER & KREICKER, NATIONALE STRAFVERFOLGUNG, *supra* note 3, at 69 et seq.

7 *Id.*; Däubler-Gmelin, *Geleitwort*, *supra* note 5, at VIII.

8 Werle, *Einleitung*, *supra* note 2, at mn. 29 et seq.; cf. *infra* at 25 et seq.

9 BT-Drs. 14/8524 (Mar. 13, 2002) at 23; Kai Ambos, *Vorbemerkung § 8 VStGB*, mn. 4, in 6(2) MÜKo ZUM StGB (2009) (hereinafter: *Ambos, Vorbemerkung*).

in such a case always committed with the crime, is of lesser importance and its prosecution will be terminated. The Internal Regulation is a code of conduct. It is binding for the soldiers but is of no importance outside of the MoD. A violation of the code may amount to a malfeasance, but it will never amount to a war crime unless the provisions of the VStGB are also fulfilled.

11. Case law is, as already mentioned, rare. This is due to the rather recent enactment of legislation and due to long duration of criminal investigations. German authorities have examined several criminal complaints pertaining to violations of armed conflict, including one against the former US Secretary of Defence Donald Rumsfeld concerning alleged acts of torture and one against two German troops concerning the aerial bombing near Kunduz, Afghanistan, in September 2009.¹⁰

III. LAW APPLICABLE TO THE CONDUCT OF HOSTILITIES

1. International Law applicable to the Conduct of Hostilities

12. Germany is a state party to most of the major treaties regarding the conduct of hostilities, including the four Geneva Conventions of 1949 and the Additional Protocols of 1977. Under art. 59 (2) GG, these instruments have become part of the domestic legal order and, in the hierarchy of norms, they are on par with acts of national legislation, but the *Grundgesetz* continues to prevail.

13. Customary international law regulation the conduct of hostilities is transformed into the domestic legal order by art. 25 GG. According to that provision, they are an “integral part of federal law” and “take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.”

¹⁰ Cf. *infra* at 35 et seq.

2. National Regulations regarding the Conduct of Hostilities

14. There is no national legislation regarding the conduct of hostilities with one exception: the German Federal Ministry of Defence (BMVg) issued a manual concerning International Humanitarian Law and the conduct of hostilities. The manual came into effect in 1992 as the *Zentrale Dienstvorschrift 15/2* (ZDV 15/2), of which a shorter version is passed on to every German soldier who is deployed. This set of rules is, however, of importance and of binding nature within the German MoD and within the armed forces only. According to a long-standing principle of German administrative law the binding effect of the ZDV 15/2 for the armed forces is brought about by the fact that it has been implemented by the civilian and military superiors/leadership of the MoD. It is not binding on anyone not belonging to the armed forces.

IV. HUMAN RIGHTS LAW

15. Germany is a state party to the major universal human rights treaties including the International Covenant on Civil and Political Rights¹¹ and the International Covenant on Economic, Social and Cultural Rights,¹² as well as to the major regional human rights treaties, including the European Convention on Human Rights. These treaties were ratified by parliament and are therefore binding for German authorities.

11 UNTS 999, 171.

12 UNTS 999, 302.

V. APPLICABLE SUBSTANTIVE CRIMINAL LAW

1. National Legislation

16. The “Code of Crimes against International Law” (VStGB) contains substantive criminal law regarding genocide (§ 6 VStGB), crimes against humanity (§ 7 VStGB) and war crimes (§§ 8 – 12 VStGB). It is the *lex specialis* of criminal law pertaining to armed conflict.

17. According to § 2 VStGB general criminal law remains applicable so far as the act does not provide a special provision in its sections. Hence, the German “Criminal Code” (*Strafgesetzbuch, StGB*) may be applicable. If it is applicable, must be assessed in every single instance. This is important for cases in which alleged offences were committed before the entry into force of the VStGB. In these cases, war crimes were not punishable as such and must therefore be assessed according to the StGB.¹³

18. Besides these instruments the members of the armed forces and certain civilian actors, mainly civilians within the chain of command, are subject to the “Code of Crimes committed by Members of the Armed Forces” (*Wehrstrafgesetzbuch, WStG*) as well as to disciplinary law (*Wehrdisziplinarordnung, WDO*). Neither of those instruments provides regulations concerning alleged violations of the law of armed conflict.

2. Public International Law

19. Germany is a state party to the ICC-Statute. With the Act introducing the ICC-Statute into the domestic legal order of December 4 2000,¹⁴ the ICC-Statute has become an integral part of German law.

¹³ Today, there is one case regarding the crime of genocide before the OLG Frankfurt.

¹⁴ Federal Gazette (BGBl.) 2000 II, at 1394.

3. Law of the Foreign States

20. Acts in armed conflict frequently occur on foreign territory. According to the territoriality principle, such acts would be dealt with under the domestic law of the state on whose territory the act was committed. However, under respective bilateral agreements and arrangements, German soldiers deployed abroad will regularly enjoy immunity and will not be subjected to the jurisdiction of foreign (criminal) courts. The competent German courts are not entitled to apply foreign criminal law. Therefore, the domestic law of foreign states is, in most cases, irrelevant.¹⁵

VI. APPLICABLE PROCEDURAL CRIMINAL LAW

21. There is no genuine military justice system in Germany. Any violation of the law of armed conflict is to be judged within the civilian court system. Therefore, the standard “Code of Criminal Procedure” (*Strafprozessordnung, StPO*) applies to all investigations and prosecutions. The structure of the courts and the concurring jurisdictions of the courts and investigators are regulated by the “Courts Constitution Act” (*Gerichtsverfassungsgesetz, GVG*). Alleged criminal offences by soldiers and other members of the armed forces will regularly constitute disciplinary offences. Accordingly, disciplinary law applies as well.

22. As regards the latter aspect it may be added that, once there is a suspicion of a criminal offence (regardless of the gravity of that offence), the commander must refer the matter to civilian authorities. Hence, the only disciplinary matters that can be dealt with by a military superior are those concerning conduct would not constitute a criminal offence at all.

15 Arndt Sinn, *Recht im Irrtum? Zur strafrechtlichen Rechtfertigung militärischer Gewalt bei Auslandseinsätzen deutscher Soldaten*, in Festschrift für Claus Roxin 673, 676 (B. Schünemann & Chr. Jäger et al. eds., 2011).

B. LAW APPLICABLE TO THE CONDUCT OF HOSTILITIES

I. INTERNATIONAL LAW

1. Treaty Law and Customary Law applicable to the Conduct of Hostilities

23. Germany is a state party to the major international treaties concerning the law of armed conflict, including the four Geneva Conventions of 1949 and Additional Protocols I and II thereof. Therefore, German forces must adhere to these rules while conducting hostilities. Germany is also bound by existing customary international law applicable to the conduct of hostilities.¹⁶

2. Human Rights Law

24. Germany is a state party to the major universal human rights treaties. At the universal level, Germany ratified the International Covenant on Civil and Political Rights of December 19 1966¹⁷ and the International Covenant on Economic, Social and Cultural Rights of December 19 1966¹⁸ in the in the year 1976.¹⁹ Both the First Optional Protocol to the International Covenant on Civil and Political Rights and the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, entered into force for Germany in 1993.²⁰ Germany is also a state party to the United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or

16 For a study on the content of customary law applicable in armed conflict cf. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW Volume I: Rules, Volume II: Practice (Cambridge 2005).

17 999 UNTS, 171.

18 999 UNTS, 302.

19 ICCPR Federal Gazette (BGBl.) 1973 II, at 1534; Federal Gazette (BGBl.) 1976 II, at 1068; ICESC Federal Gazette (BGBl.) 1973 II, at 1570; Federal Gazette (BGBl.) 1976 II, at 428.

20 Federal Gazette (BGBl.) 1992 II, at 1247; Federal Gazette (BGBl.) 1992 II, at 391.

Punishment of December 10 1984,²¹ which entered into force for Germany in 1993,²² and to its Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of December 18 2002.²³

At the regional level, Germany is a state party to the European Convention on Human Rights of November 4 1950 and several optional protocols.²⁴ These treaties were ratified by parliament and are therefore binding for German authorities.

25. The German government treats human rights law in principle as applicable in armed conflict. The federal government has repeatedly stated:

Pursuant to Article 2, paragraph 1, (author's note: of the ICCPR) Germany ensures the rights recognized in the Covenant to all individuals within its territory and subject to its jurisdiction. Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognized in the Covenant, insofar as they are subject to its jurisdiction.

Germany's international duties and obligations, in particular those assumed in fulfilment of obligations stemming from the Charter of the United Nations, remain unaffected. The training it gives its security forces for international missions includes tailor-made instruction in the provisions of the Covenant.²⁵

21 1465 UNTS, 85.

22 First Protocol Federal Gazette (BGBl.) 1990, at 246; Federal Gazette (BGBl.) 1994 II, at 311; Second Protocol Federal Gazette (BGBl.) 1993 II, at 715; Federal Gazette (BGBl.) 1993 II, at 880

23 2375 UNTS 237; Federal Gazette (BGBl.) 2008 II, at 855; Federal Gazette (BGBl.) 2009 II, at 536.

24 213 UNTS 221; Federal Gazette (BGBl.) 1952 II, at 685.

25 Comments by the Government of Germany to the Concluding Observations of the Human Rights Committee, UN Doc. CCPR/CO/80/DEU/Add.1 (Apr. 11, 2005), at 3; repeated in the parliamentary discourse, BTDRs. 16/6282 (Aug. 29, 2007), at 2, 9.

While this holds true in principle, the government points to the case law of the Federal Constitutional Court. The court ruled²⁶ that, in principle, human rights law, regardless of its nature as national or international law, binds all German authorities. This is drawn from the constitution itself, which states in article 1 (3) GG:

The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

The court held that the constitutional law, e.g. its article 1 (3) GG, must be harmonized with international human rights law. The applicability of human rights is then to be assessed by reference to article 25 GG. Article 25 GG provides for the application of general rules of international law and customary international law in Germany and transforms these rules into German law:

The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

It is important to bear in mind that the Court's judgment has brought about legal clarity only with regard to the general extraterritorial applicability of (national and international) human rights law. Accordingly, the relationship between human rights law and the law of armed conflict remains an unresolved issue.

26. Currently the Federal Ministry of Defence is drafting a new "Internal Regulation of the Ministry of Defence regarding the Law of Armed Conflict" that will address the members of the armed forces and that will not feature academic excursions on the question of applicability of human rights law in armed conflict. Nevertheless, the Government will make its

26 BVerfG, Judgment (Jun. 14, 1999), BVerfGE 100, at 313 et seq.; 362 et seq.

standpoint clearer in this regulation. As far as the present authors know from discussions with members of the drafting committee, the applicability of human rights law in armed conflict will be confirmed. The drafting committee tends to consider IHL as *lex specialis* to human rights law.²⁷ To what extent this will be the case remains to be seen. Until today, the jurisprudence of the ECtHR has not had any significant impact on German legislation or on other regulations.

27. Being bound by the European Convention on Human Rights Germany may be bound by its article 1 to adhere to this instrument even outside German territory and in armed conflict. However, in criminal proceedings against members of the German armed forces international human rights law, if at all, will be of minor relevance.

28. Still, human rights law will be, and has been, of relevance in proceedings before the European Court of Human Rights for alleged human rights violations by German armed forces abroad and before German courts for claims of compensation. The former aspect and its practical effects became obvious in a number of cases before the ECtHR, e.g. in *Behrami and Saramati*. The latter aspect has quite often played a role in cases brought before German courts by victims of war crimes committed during World War II and by victims of alleged human rights violations during peace-keeping and peace enforcement operations and during the 1999 Kosovo campaign. Still, the relationship between human rights law and the law of armed conflict has not yet been clarified.

27 Cf. the website of the German Federal Foreign Office, *available at*: www.auswaertiges-amt.de/EN/Aussenpolitik/InternatRecht/HumanitaeresVoelkerrecht.html?nn=476038#doc475162bodyText4.

II. NATIONAL LAW

29. There is no specific German legislation concerning the conduct of hostilities because parliament has not enacted any special legislation regarding the law of armed conflict. Of course, this does not mean that there is no domestic law applicable to the conduct of hostilities.

30. When the Geneva Conventions and the Additional Protocols were ratified by the Acts concerning the Geneva Conventions²⁸ and the Additional Protocols,²⁹ those treaties were transformed into German law. As a consequence, the regulations of the Geneva Conventions are now part of the national legal order of Germany. Their position in the hierarchy of norms equals to acts of parliament. Therefore, they apply to the German armed forces wherever they are deployed as soon as an armed conflict has come into existence.

31. In order to make the rules operable for the use abroad, the Federal Ministry for Defence has issued an “Internal Regulation of the Ministry of Defence regarding the Law of Armed Conflict”. This regulation, or manual, applies only to members of the armed forces. It is structured in accordance with the international obligations of Germany and keeps within the boundaries of IHL. It is to be applied in any operation.

32. In a military operation, special rules of engagement apply. These are drafted for every respective operation and determine when, where, and how force shall be used by German armed forces.

28 Geneva Convention I, Federal Gazette (BGBl.) 1954 II, at 783; Geneva Convention II, Federal Gazette (BGBl.) 1954 II, at 813; Geneva Convention III, Federal Gazette (BGBl.) 1954 II, at 838; Geneva Convention IV, Federal Gazette (BGBl.) 1954 II, at 917.

29 Additional Protocol I, Federal Gazette (BGBl.) 1990 II, at 1551; Additional Protocol II, Federal Gazette (BGBl.) 1990 II, at 1637.

C. PROCEDURAL LAW AND THE PROCESS OF INVESTIGATION

33. Germany has no military justice system. Therefore all violations of the law applicable in armed conflict as well as criminal prosecution of war crimes are dealt with by civilian authorities. As will be shown, military institutions do, however, play a major role in an investigation.

I. INTRODUCTION: THE GERMAN AUTHORITIES COMPETENT TO INVESTIGATE AND PROSECUTE ALLEGED CRIMINAL OFFENCES

34. The investigation and prosecution of alleged criminal acts is in principle performed by civilian authorities. Prosecutors, supported by the police, carry out the investigation of an alleged criminal act. Court proceedings take place before a civilian criminal court. According to one of the underlying concepts of the German state, the division of the federation into *Länder*, the *Länder* are primarily tasked with the investigation and prosecution of alleged criminal offences that do not amount to war crimes under the VStGB. This holds true for investigation, prosecution, indictment and trial proceedings. It needs to be emphasized, however, that alleged violations of the law of armed conflict are within the competences of federal authorities.³⁰ In other words, it is within the authority of the *Länder* to investigate, prosecute, indict and proceed in trial with any criminal proceeding including alleged violations of the law of armed conflict. However, the GBA has a special competency regarding alleged violations of the law of armed conflict.

35. There is no military justice system in place – even with a view to alleged violations of the law of armed conflict. Still, military authorities are carrying out important tasks within an investigation. That aspect will be dealt with later on.

30 Cf. *supra*, at 2.

1. The German Court System

36. Depending on the respective offence, criminal proceedings may be instituted before the local courts (*Amtsgerichte*), the regional courts (*Landgerichte*) or the higher regional courts (*Oberlandesgerichte*). The latter are the courts of first instance in exceptional circumstances only. They have jurisdiction for hearing and deciding cases at first instance involving, among others, treason, crimes against constitutional organs or crimes under the VStGB (§ 120 (1) GVG). Accordingly, alleged violations of the law of armed conflict that may amount to war crimes will be heard and decided by the higher regional courts.

2. Prosecutors

37. Civil prosecutors are the authority tasked with investigating and prosecuting criminal offences. German law confers authority to one prosecutor in each district of a higher regional court (*Generalstaatsanwalt*, Attorney General). The Attorney General is supported by his/her office, called the Office of the Prosecutor (OTP, *Generalstaatsanwaltschaft*). Again, these authorities are organs of the respective federal state, not of the federation.

38. The federation only has very limited competencies to investigate and prosecute crimes. These competencies are carried out by the *Generalbundesanwalt* (GBA, Federal Prosecutor General). The GBA has original and derivative competencies.

First, the GBA is genuinely tasked with the investigation and prosecution of all alleged crimes that will be heard and decided by higher regional court (§ 142a (1) GVG). As already mentioned, this also entails the competence of the GBA to investigate and prosecute alleged war crimes. Consequently, every violation of the law of armed conflict that may amount

to a war crime will be examined by the GBA.

Second, the GBA may take over investigation and prosecution from one of the Attorney Generals of the federal states prior to the opening of the main proceedings due to the special significance of the case (§ 74 (2) GVG). If an act is, at an earlier stage, not considered a war crime, but if, in the course of an investigation, there are reasonable grounds for assuming that it amounts to a war crime, the GBA may take over and prosecute the act that will then be considered a possible war crime.

39. All prosecutors, whether organs of a federal state or of the federation, are obliged to investigate every alleged crime. This is due to the principle of mandatory prosecution, § 152 (2) StPO, except if otherwise provided by law. Thus, an alleged violation of the law of armed conflict must be investigated in order to establish whether or not a war crime has been committed. In practice, this has proven to be a difficult task.³¹

40. In sum, the respective authorities will have carriage of an investigation and prosecution in the following situations:

- Offences under the VStGB are investigated and prosecuted by the federal authorities, i.e. by the GBA.
- The same holds true if the respective conduct does not constitute a violation of the VStGB but if it has been committed in connection with an armed conflict.
- Disciplinary offences are investigated by the military authorities that are federal authorities as well.
- All other offences will be investigated and prosecuted by an OTP.

³¹ Infra, at 12 et seq.

3. Leadership structure of the Prosecution

41. The employees of the GBA are civil servants (§ 148 GVG). As such, they must comply with the official instructions of their superiors (§ 146 GVG). These orders can pertain to all matters before the GBA, meaning that the superiors of the GBA can guide the actions of the GBA and especially the possibility to dispense with the prosecution according to § 153f StPO. It needs to be emphasized, however, that such orders must themselves be lawful.

42. The GBA is a part of the civilian justice system. It is headed by the Federal Prosecutor General. Superior to him/her is the Federal Minister for Justice (§ 147 No. 1 GVG).

The Federal Minister of Justice is a member of the German federal government. He/she is therefore a member of the executive branch. He/she, like every other Federal Minister, shall conduct the affairs of his department independently and on his/her own responsibility (so called *Ressortkompetenz*, art. 65 sentence 2 GG). Therefore, the minister has the authority within his/her department. This power is not unlimited. It exists only within the limits of the law. It entails the (political) responsibility for all subordinates and their actions.

This power has yet another limit. The Federal Minister is a member of the federal government. The government is headed by the Chancellor. He/she has the power to determine policy guidelines (art. 65 sentence 1 GG). Accordingly, the Chancellor may order his/her ministers to act in a certain way. This also holds true with regard to the investigation and prosecution of alleged violations of the law of armed conflict and of war crimes. In practice, the Chancellor, being the highest member of the executive branch in Germany, may influence the investigations and prosecutions of the

GBA.³² However, there is no information available if such an order was ever given.

43. Neither the Minister's nor the Chancellors' power to issue orders is unlimited or would lead to a different legal framework of the investigation and prosecution of alleged violations of the law of armed conflict and of war crimes. While issuing orders and while ordering the GBA to act in a certain way, he/she must comply with all regulations that also apply to the actions of the GBA. This leaves no room for political motives within the investigation. The investigation and prosecution may not be terminated or suspended for political reasons. The principle of mandatory and unbiased investigation cannot be overturned by an order of a superior.

4. Police and Military Investigations

44. During the investigation of an alleged criminal offence the General Attorneys and the GBA are supported by the police. The GBA may decide that the help of the Bundeskriminalamt (BKA, Federal Criminal Police Office) is needed. Then the BKA is obliged to act (§ 4 (2) No. 3 BKAG). Such a request can be issued in cases of alleged crimes under the VStGB. It needs to be borne in mind that the BKA is faced with the same practical obstacles as other German authorities tasked with criminal prosecution if an act has occurred in another state's territory. For instance, in the case of Ignace Murwanashyaka et al. the German authorities were able to conduct investigations on-site; this was possible because the Congolese authorities cooperated fully with the German authorities.

45. The military police nevertheless plays a major role in the investigation of alleged violations of the law of armed conflict. Cooperation between the civilian and military authorities is vital for the complete investigation of such a violation, for the civilian authorities have no legal powers at the site

32 ESER, SIEBER & KREICKER, NATIONALE STRAFVERFOLGUNG, *supra* note 3, at 425.

where the alleged violation was committed, which is regularly on foreign soil.

46. It is important to bear in mind that the military police is a special branch of the German military. As such, they are independent within the military. They have their own chain of command. The officers as well as other soldiers have a special training for policing. There is no regulation in general concerning the military police. Where special powers are conferred to them, it is especially stated in a statute. These powers include the maintenance of security within military compounds, the arrest of deserted soldiers and the traffic control of military vehicles

II. CRIMINAL INVESTIGATIONS OF AN ALLEGED VIOLATION OF THE LAW OF ARMED CONFLICT

1. The Start of an Investigation within the Military

47. Once an alleged violation of the law of armed conflict has occurred, its investigation commences. By policy, in every instance in which a person is killed by German troops, an investigation is started except if there are no civilian casualties.

It is interesting to note that this policy, which has been referred to by the GBA and by the MoD in official statements, has not been recorded in any accessible document or regulation. It applies in every instance in which a civilian is killed by members of the German armed forces, regardless of whether the situation has been formally deemed to be one of armed conflict or merely a stabilization or law enforcement operation. It goes without saying that the intensity of hostilities or the unresolved legal status of the person killed have no impact on its applicability. In other words, each time an alleged civilian is killed, the military commander will inform the OTP

in Potsdam which will again immediately inform the GBA. The GBA then proceeds with the investigation.

48. Every violation of the law of armed conflict is considered to be a *Dienstvergehen* (malfeasance) and therefore subject to disciplinary measures (§ 17 (1) SG). It is of no significance whether the act was committed on or off duty. Competent for the investigation of such a malfeasance is the superior officer of the alleged perpetrator, § 32 (1) 2 WDO. The superior officer has no discretion whether or not to investigate; according to the principle of mandatory prosecution he is bound by law to do so.³³ He must investigate all facts concerning the act, including mitigating circumstances, § 32 (3) SG. Most of the time the commander will task his legal advisor with the investigation, who is again supported by German military police.

However, according to § 83 WDO, disciplinary processes must be suspended as long as the criminal procedures are not terminated. As soon as the criminal matter is resolved, the disciplinary procedure continues. This is mandatory. The disciplinary courts are bound by the factual findings of the criminal court (§ 84 WDO).

49. The major obstacle during the investigation is the limited legal power of the German military. Under public international law German authorities cannot act on foreign soil as they please. All acts of state are therefore forbidden unless the territorial state has consented into the commencement of such acts. The German military authorities, i.e. the commanding officer, the legal advisor and the military police, have the powers conferred to them by military law as far as the receiving state has consented to their execution.

50. Military investigators have not the same competencies as civil criminal investigators. Under the Code of Criminal Procedure (StPO),

33 Klaus Dau, § 32 WDO, at mn. 6, in *WEHRDISZIPLINARORDNUNG* (2009).

the major powers to investigate alleged criminal offences are conferred to the civilian authorities. They entail far-reaching powers. In order to be used before a court, evidence has to be collected by official authorities. If officials do not use the measures provided for in the StPO, evidence and examinations of witnesses may not be used in court proceedings. But, again, the StPO confers no powers to military authorities; they have the powers conferred to them under military law.

51. As regards the collection and preservation of evidence there are no other rules, policies or practices. This issue is regularly dealt with on a case-by-case basis and in accordance with the rules described above. The on-scene legal advisor will provide the guidance necessary to ensure that those rules are complied with.

52. The military lawyers serving as legal advisors to the commanders of German forces deployed abroad are civil servants within the MoD, and, thus integrated into the civilian “chain of command”. While they may be given a temporary military rank for the duration of their employment, they remain under the supervision of the chief legal advisor. Their function as legal advisors is limited to the MoD and the German armed forces. However, the MoD disposes of a legal department that will in case of conflict have prevalence over the on-scene legal advisors. The on-scene legal advisors are obliged to comply with the legal opinions given by the MoD’s legal department. It should be emphasized that the other branches of government/ministries have their own legal advisors and legal departments. Hence, if there is a division of opinions, the ministries concerned will have to reconcile their positions and views. In practice, the Foreign Office (Ministry of Foreign Affairs) has become the lead-Ministry also for issues related to the law of armed conflict. Hence, any legal position developed within the MoD must be cleared with the Foreign Office.

53. The military lawyers also perform the function of an indicting

authority in disciplinary matters at the “Truppendienstgerichte”. As such they are under the supervision of the highest disciplinary lawyer, analogous to the civilian prosecutors.

54. The powers of the civilian authorities and the exclusive regulation by the Code of Criminal Procedure (StPO) do quite often pose practical problems to investigations on foreign territory. While military authorities would be entitled to collect evidence that will be used in court they often will have difficulties in complying with the rather strict standards of the StPO. Moreover, the military authorities may conduct interrogations that would be inadmissible for civilian prosecutors.

55. There is one aspect in which the diverging powers pose a problem. In military matters or matters that concern the duties of a soldier, a soldier is obliged to answer and to tell the truth if interrogated about an incident, § 13 (1) SG. He is not free to choose whether he wishes to respond or not. This is due to the specific characteristics of the military.³⁴ If the examination concerns a possible disciplinary matter, entailing disciplinary sanctions (imposed by the military superior), the soldier is free to choose whether or not he wants to say anything at all. If he answers, he must tell the truth and leave nothing out of his statement, § 32 (4) 3 WDO. This again does not apply in military disciplinary courts, where the accused has no obligation to tell the truth.³⁵ In criminal proceedings the principle of *nemo tenetur se ipsum accusare* prevails. Thus, an accused has the right to respond to the charges or not to make any statement on the charges, § 136 (1) StPO. The accused may even choose to lie. This discrepancy between court and disciplinary proceedings may lead to a statement that is valuable in military matters only and may under no circumstances be made use of in a criminal trial. How to solve this issue remains unclear. Some demand that the StPO must be amended to include a provision which prohibits

34 Alexander Poretschkin, *Strafprozess versus Wahrheitspflicht der Soldaten*, 87(10) DRiZ 288 (2009) (hereinafter: Poretschkin, *Strafprozess versus Wahrheitspflicht*).

35 BVerwGE 33, at 168 et seq.

the use of a statement that was made under the duty to tell the truth,³⁶ while others propose either a criminal-procedure-oriented interpretation of § 32 (4) 3 WDO or a very early involvement of public prosecutors.³⁷

56. It may be added that investigations of alleged violations of the law of armed conflict are conducted on their own merits. Hence, operational debriefings have no impact and are regularly ignored.

2. Referral to Civilian Authorities

57. If the investigation reveals sufficient grounds for suspicion that a criminal offence has been committed, the commanding officer is obliged to submit the outcome of the investigation to a prosecutor's office, § 33 (3) WDO. The military investigation conducted for disciplinary sanctions will be the basis for further criminal investigations by the prosecutor.

58. In most cases concerning violations of the law of armed conflict the commanding officer informs the prosecutor already during the investigation. The prosecutor is then able to engage in the ongoing investigation. Because the prosecutors do not have any powers over the military authorities, military investigators act independently from civilian authorities. The civilian prosecutors may express their ideas and wishes for the criminal prosecution, but the military authorities are not required to adhere to them.

59. It is difficult for the superior to assess the prosecutor's office that is to be informed. Therefore, according to an understanding of all Attorney Generals, the military superior will refer the matter to the OTP in Potsdam. This Office of the Prosecutor is the first point-of-contact for crimes

36 Fabian Stam, *Strafverfolgung von Bundeswehrsoldaten im Auslandseinsatz*, 6(10) ZIS 628, 629 (2010) (hereinafter: *Stam, Strafverfolgung von Bundeswehrsoldaten*).

37 Poretschkin, *Strafprozess versus Wahrheitspflicht*, *supra* note 34, at 290.

committed abroad by or against members of German armed forces.³⁸ The understanding was concluded for several reasons. First, all deployments of German armed forces are commanded from Potsdam. Second, according to German law, in exigent circumstances, an official of the public prosecution office who lacks competence must perform the official acts necessary in his district, § 143 (2) GVG. This shall secure the complete investigation of such an act. Third, most Attorney Generals and their staff do not have experience in IHL and war crimes. Thus, if the OTP Potsdam is the first point-of-contact, the staff in Potsdam will gather sufficient experience to conduct an assessment very fast. Thus, if a case of alleged violations of the law of armed conflict arises, the military commander will inform the office of the prosecutor in Potsdam. This office will then determine the office responsible for further investigations and proceedings. Basically the OTP Potsdam has to choose between two possibilities.

a. Competent Office at the Last Post of an Accused

60. The OTP Potsdam may refer the matter to the prosecutor in the district of the last post of the accused in Germany. According to § 8 (1) StPO, § 9 (1) 2 BGB the respective Office of the Prosecutor is competent, in whose district the accused had his last post in Germany. This might be difficult to assess, for there are 24 such districts. It is even more difficult if several accused persons have been deployed to the foreign state from different posts in Germany. This might lead to different proceedings before different courts but concerning the same incident.

b. Federal Authority

61. The OTP Potsdam may also refer the matter to the Federal Prosecutor

³⁸ Rolf Hannich & Erardo Cristoforo Rautenberg, *Brauchen wir einen besonderen Gerichtsstand für Straftaten im Zusammenhang mit Auslandseinsätzen der Bundeswehr?*, 11(5) ZRP 140, 141 (2010); Stam, *Strafverfolgung von Bundeswehrsoldaten*, *supra* note 36, at 628.

General, if the alleged act may amount to a war crime. Since the enactment of the VStGB, the GBA is competent to prosecute and indict violations of the law of armed conflict, §§ 120 (1) Nr. 8, 142a (1) GVG. The law confers to the GBA all cases of alleged crimes under the VStGB.

The task of the GBA is to investigate all circumstances regarding an alleged violation of the law of armed conflict, including mitigating factors. The biggest problem posed during an investigation is that the GBA has no possibility to investigate on site. The authorities or the German armed forces abroad will primarily conduct an investigation; officials of the GBA may only be guests during the investigation. This is criticized by the GBA for they claim that an investigation of alleged violations of the law of armed conflict can only be conducted under difficult circumstances. This may lead to an incomplete establishment of facts.

c. Future Course of Investigation

70. Hence, the OTP Potsdam becomes a focal point for the further course of criminal proceedings once the military authorities are investigating. It is within its responsibility to refer to the GBA as soon as the OTP Potsdam assumes that the alleged act was conducted in connection with an armed conflict. It is for the GBA to decide whether or not such a conflict exists.

71. For instance, in the first major case before the GBA the office decided that the situation in Afghanistan is to be classified as a non-international armed conflict.³⁹ This finding is not limited to the act in question but is of overall importance. According to the decision of the GBA, as soon as an armed conflict exists and the act in question was conducted “in connection with an international armed conflict or with a non-international armed

39 For the facts and an evaluation of the Kunduz air attack see Wolff Heintschel von Heinegg & Peter Dreist, *The 2009 Kunduz Air Attack: The Decision of the Federal Prosecutor-General on the Dismissal of Criminal Proceedings Against Members of the German Armed Forces*, 53 GERMAN Y.B. OF INT'L L. 833 (2010) (hereinafter: *Heintschel von Heinegg & Dreist, The 2009 Kunduz Air Attack*).

conflict”, the GBA is competent to investigate, prosecute or dispense with any violation of the law. In other words, the competency of the GBA is in such cases not restricted to the VStGB, but covers the StGB with the regular offences as “murder,” “homicide”, “negligent manslaughter” etc. This opinion of the GBA may be disputed,⁴⁰ but the GBA will probably not change its opinion and the other OTPs will probably concur with this decision.

Therefore, as soon as another alleged violation of the law of armed conflict in Afghanistan arises, the OTP Potsdam will most likely refer the matter to the GBA immediately.

d. Dispense with the Prosecution

aa. Legal Framework to Dispense with the Prosecution

72. Once an act is considered to be a criminal act, criminal investigation is mandatory. This applies to all German prosecutorial authorities, whether local or federal. This is due to the principle of mandatory prosecution, which obliges prosecutors to investigate, except as otherwise provided by law, § 152 (2) StPO. The Code of Criminal Procedure then goes on in establishing such exceptions. As regards the termination of an investigation regarding violations of the law of armed conflict the sole exception to mandatory prosecution is to be found in § 153f StPO. This rule provides:

(1) The public prosecution office may dispense with prosecuting a criminal offence for which there is criminal liability pursuant to sections 6 to 14 of the Code of Crimes against International Law in the cases referred to in Section 153c subsection (1), numbers

40 Wolfgang Kaleck, Andreas Schüller & Dominik Steiger, *Tarnen und Täuschen: Die deutschen Strafverfolgungsbehörden und der Fall des Luftangriffs bei Kundus*, 43(3) KRITISCHE JUSTIZ 270 (2010) (hereinafter: *Kaleck, Schüller & Steiger, Tarnen und Täuschen*).

1 and 2,⁴¹ if the accused is not resident in Germany and is not expected to so reside. If, in the cases referred to in Section 153c subsection (1), number 1, the accused is a German, however, this shall only apply if the offence is being prosecuted before an international court of justice or by a state on whose territory the offence was committed or a citizen of which was injured by the offence.

(2) The public prosecution office may dispense with prosecuting an offence for which there is criminal liability pursuant to sections 6 to 14 of the Code of Crimes against International Law in the cases referred to in Section 153c subsection (1), numbers 1 and 2, in particular if

1. no German is suspected of having committed the crime
2. the offence was not committed against a German;
3. no suspect is, or is expected to be, resident in Germany
4. the offence is being prosecuted by an international court of justice or by a country on whose territory the offence was committed, a citizen of which is either suspected of the offence, or suffered injury as a result of the offence. The same shall apply if a foreigner who is accused of a criminal offence that was committed abroad is resident in Germany but the requirements of the first sentence, numbers 2 and 4, are met and transfer to an international court of justice or extradition to the prosecuting state is admissible and intended.

(3) If, in the cases referred to in subsections (1) or (2) public charges have already been preferred, the public prosecution

41 § 153c (1) Nr. 1, 2 read as follows:

“(1) The public prosecution office may dispense with prosecuting criminal offences

1. which have been committed outside the territorial scope of this statute, or which an inciter or an accessory before the fact to an act committed outside the territorial scope of this statute has committed within the territorial scopethereof; 2. which a foreigner committed in Germany on a foreign ship or aircraft”.

office may, at any stage of the proceedings, withdraw the charges and terminate the proceedings.

73. Therefore, subsection (1) is applicable to alleged perpetrators not present in Germany while alleged perpetrators in Germany must be assessed under subsection (2) of § 153f StPO.⁴² It is important to note that, unlike other serious crimes under German law, § 153f StPO provides no opportunity to terminate an investigation for political motives. Unless other provisions of German procedural law apply, § 153f StPO allows for a dispense of the trial even if the proceedings before the court have started.

74. The legislature included this possibility to prevent the German courts to be used for forum-shopping. The German legal order is not to be used as a forum in which trials can be conducted for political reasons.⁴³ Additionally, German resources of criminal prosecution should be focused on investigations that have a realistic chance to be on trial.⁴⁴

bb. Application of the Framework until today

75. The exception of § 153f StPO was applied in a few instances.⁴⁵

First, in November 2003 a criminal complaint against the Chinese president Jiang Zemin was brought forward. The complaint concerned charges of crimes against humanity allegedly committed against members of the Falun Gong movement. Second, a German-based human rights organization brought forward a complaint against then-vice-president of

42 Kai Ambos, *Völkerrechtliche Kernverbrechen, Weltrechtsprinzip und §153f StPO - Zugleich Anmerkung zu GBA, JZ 2005, 311 und OLG Stuttgart*, 26 NStZ 434, 436 (2006) (hereinafter: *Ambos, Völkerrechtliche*).

43 *Id.*, at 434 et seq.

44 BT-Drs. 14/8524 (Mar. 13, 2002), at 37; ESER, SIEBER & KREICKER, *NATIONALE STRAFVERFOLGUNG*, *supra* note 3, at 261.

45 Nils Geißler & Frank Selbmann, *Fünf Jahre Völkerstrafgesetzbuch: Eine kritische Bilanz*, 20(3) HuV-I 160, 161 (2007) (hereinafter: *Geißler & Selbmann, Fünf Jahre*).

Chechnya, Ramzan Kadyrov, regarding the alleged perpetration of war crimes.

76. Both complaints did not lead to an investigation. The competent authority, the GBA, in both cases decided not to institute investigations for two reasons: The first reason against the commencement of proceedings was the existence of immunities that protected the alleged offenders from German criminal prosecution. The second argument was a word-based reading of § 153f StPO: It found that neither suspect was residing in Germany or expected to do so, nor were any suspects German nationals (§ 153f (1) StPO).

77. The third case is the most spectacular. A US/German human rights organization together with victims of the alleged offences complained to the GBA about Donald Rumsfeld, former Secretary of Defence of the United States of America and other US-nationals. Allegations were brought forward regarding the mistreatment of prisoners at Abu Ghraib prison in Iraq, which were considered to be war crimes.⁴⁶ In particular, the organization claimed violations of the responsibility of military and civil superiors according to §§ 4, 13, 14 VStGB.

78. The GBA did not commence an investigation. It based its decision on a slightly different reading of § 153f StPO than in the other cases mentioned. Again, the GBA found in “Rumsfeld 1”⁴⁷ the prerequisites of § 153f StPO to be fulfilled. This time the GBA read § 153f StPO in the light of art. 17 ICC-Statute. From this comparison the GBA drew the conclusion that either the state of which the perpetrator or victim is a national or the state on whose territory the crimes were allegedly committed, were primarily responsible for the prosecution. Only if they were unwilling or

⁴⁶ OLG Stuttgart, reference-no. 5 Ws 109/05, decision (Sep. 5, 2005).

⁴⁷ Press release Nr. 6/2005 of the GBA, *available at*: www.generalbundesanwalt.de/de/showpress.php?newsid=163.

unable to start an investigation the German legal system would permit actions by German authorities. This was also based on the assumption that impunity must be avoided. The GBA continued to state that the question whether or not an offence is being prosecuted by such a state is not to be assessed for each alleged offender, but for the entire alleged act. It based this reading on art. 14 ICC-Statute and referred to the term “situation” under the statute. From the information available to the GBA, the office concluded that there was an investigation of the incidents at Abu Ghraib prison in the United States and that therefore no German prosecution was to be conducted. Additionally the alleged offenders were neither residing in Germany nor was their residence to be anticipated. Even the alleged offenders who were on post in Germany were banned from German jurisdiction for they were members of the armed forces and, being such members, the US had the primary jurisdiction over them. According to the GBA the soldiers in Germany were to be treated as if they were residing in the United States. The GBA explicitly denied any relevance of possible immunities or of insufficient factual indications for the allegations. This decision of the GBA was later brought before a German court (see *infra* cc.).

79. This decision received criticism in the literature.⁴⁸ Especially the interpretation of the term ‘situation’ was criticized, for the Rome Statute uses this term for the very initial phase of a “proceeding”, but § 153f StPO only applies in a later phase, in the Rome Statute called a “case”. Also the referral to art. 17 ICC-Statute was rejected.

80. The victims of the alleged crimes and the complaining organization brought forward another criminal complaint against Donald Rumsfeld et al. in November 2006. This time the complaints focused on incidents in

48 Cf. only Kai Ambos, § 1 Anwendungsbereich, mn. 29-30, in 6(2) MÜKo ZUM StGB (2009) (hereinafter: *Ambos, Anwendungsbereich*); Ambos, *Völkerrechtliche*, *supra* note 42, at 436 et seq.; Michael E. Kurth, *Zum Verfolgungsermessen des Generalbundesanwaltes nach § 153f StPO*, 1(2) ZIS 81 (2006).

Abu Ghraib prison as well as in Guantanamo Bay Naval Base. The GBA rejected the complaint and reasoned along the line of “Rumsfeld 1”.⁴⁹

81. Fifth, former Minister of the Interior of Uzbekistan, Sekir Almatov, travelled to Germany to receive medical treatment in 2005. Several human rights organizations, including Amnesty International and Human Rights Watch, filed a criminal complaint against Almatov and his affiliates, asked the German authorities to arrest Almatov and bring him to trial for an alleged massacre in Andijan in May 2005. Almatov left Germany at an unknown point in time. Later the GBA informed the claimants that no investigation would be instituted. The prosecution based its decision again on the assumption that none of the alleged offenders were German nationals or (prospect) residents in Germany. Almatov had left Germany before the complaints were brought forward. Additionally, the alleged offences were committed outside of the territorial scope of the German Code of Criminal Procedure. The GBA highlighted the fact that the investigation would depend on on-site-investigations in Uzbekistan. Given the relationship between Almatov and the Uzbek Government, that seemed unrealistic to the GBA. German prosecution would therefore only be of a symbolic nature.⁵⁰ During a parliamentary hearing the German Federal Government concurred with the decision of the GBA.⁵¹

cc. Judicial Control of the Dispense

82. In the case of “Rumsfeld 1” the victims and the human rights organization appealed the decision of the GBA before the Higher Regional Court in Stuttgart.⁵² The court decided that an appeal based on an alleged arbitrary application of § 153f StPO was not admissible. It based its

49 GBA Press release no. 9 (Apr. 27, 2007), available at: www.generalbundesanwalt.de/de/showpress.php?themenid=9&newsid=273; Geißler & Selbmann, *Fünf Jahre*, *supra* note 45, at 162.

50 The GBA has not issued any press release regarding the matter, the information used herein is provided by Geißler & Selbmann, *Fünf Jahre*, *supra* note 45, at 162.

51 BT-Drs. 16/1781 (Jun. 8, 2006).

52 OLG Stuttgart, reference-no. 5 Ws 109/05, decision (Sep. 13, 2005).

decision on § 153f StPO. This regulation leaves to the discretion of the GBA, whether or not an investigation shall be commenced or continued. The law sets certain limits, but within the limits of the law, the GBA is free to decide. If the GBA decides not to institute an investigation, halt an ongoing investigation or an ongoing prosecution or even withdraw the indictment (leading to the termination of court proceedings), and this decision is based on § 153f StPO alone, there is no judicial control mechanism of this decision.⁵³ A court may only decide on the issue whether or not the GBA has used its discretionary powers at all or in an arbitrary fashion.⁵⁴ The decision itself is subject to no review by the courts.

83. A decision of the GBA can be challenged if the GBA terminates proceedings because of a lack of sufficient factual indications for the allegations. Then a judicial review would be admissible, § 172 (2) StPO (*Klageerzwingungsverfahren*). This was not the case in “Rumsfeld 1”.

3. Trial Proceedings

84. If the GBA comes to the conclusion that there is sufficient evidence to indict an accused, the indictment is filed with the higher regional court for hearing and deciding at first instance, § 120 (1) Nr. 8 GVG. The GBA remains responsible for the indictment before the court, regardless of which court has jurisdiction.

85. As of June 2011 there is only one trial based on allegations of war crimes under the VStGB. This trial commenced on May 4 2011 before the OLG Stuttgart and concerns allegations of war crimes in the Congo committed from German soil. Because the indictment is based on the VStGB, the principle of universal jurisdiction is used to conduct the trial.

⁵³ *Id.*

⁵⁴ *Id.*; *Ambos, Anwendungsbereich*, *supra* note 48, at mn. 32; *Ambos, Völkerrechtliche*, *supra* note 42, at 434 et seq.

4. Appeal

86. A judgment of the higher regional court can be appealed before the Federal Court of Justice, § 135 (1) GVG. The appeal is admissible on points of law only (Revision).

III. AVAILABLE SANCTIONS FOR A VIOLATION OF THE LAW OF ARMED CONFLICT

87. If a violation of the law of armed conflict amounts to a war crime under §§ 8 VStGB et seq.⁵⁵ the offender may be sanctioned with the penalties available under German law. These are imprisonment or payment of a fine.

As regards imprisonment, war crimes may be punished with a wide range of temporal sanctions. At a maximum the imprisonment may last for life, which in Germany means 25 years with the chance of parole.

88. Prison terms include

- imprisonment for life (in Germany, this means 25 years, § 8 [1] No. 1 VStGB),
- imprisonment for not less than five years (e. g. § 8 [1] No. 2 VStGB)
- imprisonment for not less than three years (e. g. § 8 [1] No. 3-5, § 8 [2] VStGB)
- imprisonment for not less than two years (e. g. § 8 [1] No. 6-8, § 8 [3] VStGB)
- imprisonment for not less than one year (e. g. § 8 [1] No. 9

⁵⁵ See *infra*, at chapter D.

VStGB)

As a minimum, the imprisonment may last only days. However, a “court shall not impose a term of imprisonment of less than six months unless special circumstances exist, either in the offence or the person of the offender, that strictly require the imposition of imprisonment either for the purpose of reform of the offender or for reasons of general deterrence” (§ 47 [1] StGB). If the term to which the offender is sentenced is less than two years, the sentenced may be suspended for probation.

89. Fines can be from five days pay to 360 days pay (§ 40 [1] StGB). The court of trial establishes the amount of a days pay. In order to do so, the court shall determine the amount of the daily unit taking into consideration the personal and financial situation of the offender. In doing so, it shall base its calculation on the actual average one-day net income of the offender or the average income he could achieve in one day. A daily unit shall not be set at less than one and not at more than thirty thousand Euros. The income of the offender, his assets and other relevant assessment factors may be estimated when setting the amount of a daily unit (§ 40 [2, 3] StGB).

90. If a civil servant is sentenced to more than one year imprisonment for an offence, he/she may be dishonorably discharged from public service (§ 24 Beamtenstatusgesetz; § 48 SG, § 43 [2] SG; § 63 WDO). If a violation of the law of armed conflict does not amount to a war crime it may be considered to be a malfeasance. There are two different categories of malfeasance. Petty offences may be sanctioned by the military commander, § 22 WDO, while more serious offenses are reserved to the courts, § 58 WDO.

Lesser sanctions are:

- censure (*Verweis*),
- public censure,

- fine not exceeding one month's pay
- curfew / detention and
- arrest from three days up to three weeks.

Sanctions that may only imposed by a court are:

- cut-back of the pay from 1/20 up to 1/5 for as long as six months to five years,
- cut-back of the pay group,
- cut-back of pensions (including total elimination of pensions)
- prohibition of promotion from one to four years,
- degrading,
- discharge from public service.

IV. THE ROLE OF VICTIMS IN THE PROCEEDINGS

1. During the Investigations

91. The victims of a crime play a minor role in the proceedings. Most importantly, the victims and their legal representative have not the same rights as the accused.

The suspect has the right to access the files of the investigation, § 147 StPO. This applies only once the investigation is closed and the facts have been established. It holds true, in principle, for the victims as well. But their right to inspect the files of the investigation can only be exercised by a legal representative, not by the victim itself, §§ 397 (1), 385 (3) StPO. However, this right is limited. According to § 406e (2) StPO

Inspection of the files shall be refused if overriding interests

worthy of protection, either of the accused or of other persons, constitute an obstacle thereto. It may be refused if the purpose of the investigation, also in another criminal proceeding, appears to be jeopardized. It may also be refused if the proceedings could be considerably delayed thereby, unless, in the cases designated in Section 395, the public prosecution office has noted the conclusion of the investigations in the files.

An overriding interest was, e.g., recognized with a view to the protection of the military operation in Afghanistan (case against Colonel Klein et al.). Hence, the victims were not allowed not inspect the files. Their legal representatives claimed that they had, thus, been prevented from performing their functions effectively.⁵⁶

92. It may be added that the GBA's the evidence provided to the GBA by, inter alia, the German military police, ISAF and local Afghan authorities, was comprehensive. However, in the final report, the GBA noted that there had been a delay in the on-scene inspection (which took place only at noon of the next day) and that the cultural and religious circumstances in Afghanistan did not allow for a timely collection of further evidence.

2. In Court Proceedings

93. In court proceedings the victims may support the prosecution. As a prerequisite, the victim must be admitted as a "Private Accessory Prosecutor" (*Nebenkläger*) according to §§ 395 StPO et seq. Such a private prosecutor has no broader rights than the authorities. He may be present during the hearings, § 397 (1) StPO, is entitled to challenge a judge or an expert, to ask questions, to object to orders by the presiding judge, to object to questions, to apply for evidence to be taken, and to make statements. Unless otherwise provided by law, he shall be called in and heard to the same extent as the public prosecution office. Decisions that are notified to

⁵⁶ Kaleck, Schüller & Steiger, *Tarnen und Täuschen*, *supra* note 40, at 270 et seq.

the public prosecutor's office shall also be notified to the private accessory prosecutor.

V. OTHER POSSIBILITIES OF INVESTIGATION

94. Alleged violations of the law of armed conflict can be examined not only in criminal fora. But, according to the principle of separation of powers, criminal investigation cannot take place anywhere else except before a criminal court.

1. Disciplinary measures

95. As stated above, disciplinary investigations may cover violations of the law of armed conflict. As soon as the suspicion of a criminal act arises, the case is then referred to the competent authorities.

Disciplinary proceedings may be conducted before two fora. Petty offences may sanctioned by the military commander, § 22 WDO, while more serious offenses must be handled before the courts, § 58 WDO.

Lesser sanctions are:

- censure (Verweis),
- public censure,
- fine not exceeding one month's pay
- curfew / detention and
- arrest from three days up to three weeks.

Sanctions that may only imposed by a court are:

- cut-back of the pay from 1/20 up to 1/5 for as long as six months to five years,
- cut-back of the pay group,
- cut-back of pensions (including total elimination of pensions)
- prohibition of promotion from one to four years,
- degrading,
- discharge from public service.

2. Public Inquiries

96. The first mayor case concerning alleged war crimes of German nationals was the air attack near Kunduz, Afghanistan, on 4 September 2009.

In short, a German Colonel had ordered an air strike. Targets were two trucks carrying fuel which had been captured by the insurgents. The commanding officer, the German Colonel Klein, believed that the trucks would be used as explosive devices against ISAF-troops. In the time frame between the capture and the air strike, the insurgents managed to gather civilians on site, although it remains unclear, how many civilians were present when the air strike occurred. Colonel Klein ordered his subordinate to call for air support by US jets that were available. The jets attacked the trucks, destroyed them and killed numerous people on the ground.

97. The conduct of the two members of the German armed forces, Colonel Klein and Master Sergeant Wilhelm was investigated in the manner described above.⁵⁷ The investigations concerned allegations of violations of the law of armed conflict and therefore possible war crimes.

⁵⁷ See *supra*, at chapter C.

The prosecuting GBA decided not to indict the two officers, for the office could not find any criminal wrongdoing.⁵⁸ The prosecution could, first of all, not establish any intent of the acting officers. Second, the GBA emphasized the fact that it could not investigate the situation on site. This was based on the fact that Afghan authorities were not willing to let the German authorities investigate as they wished to and for cultural reasons. The GBA gave the example that it was not possible to exhume the bodies and conduct an autopsy on the dead.

98. Besides the criminal proceedings, German federal parliament, the *Bundestag*, was seized of the matter. Subject of the parliamentary inquiry were alleged wrongdoings of public officials, including the Minister of Defence, his deputy, the joint chief of staff, and the Chancellor. The alleged offenses were never supposed to amount to violations of the law of armed conflict. The public officials were suspected of lying to the public and of a mismanagement of the investigation in Afghanistan.

This is based on the fact that the decision whether or not an act is a criminal offense is decided by the courts and cannot, for reasons of the constitutional separation of powers, be established by any other body. This principle of law, on the other hand, gives parliament the power to control the acts of the executive branch. This control mechanism applies to political as well as managerial issues.

3. Other Possibilities to Investigate Alleged Violations of the Law of Armed Conflict

99. The investigation of alleged violations of armed conflict is, in principle, limited to disciplinary and criminal proceedings. There is, to be clear, no mandatory or optional judicial process to establish whether or not

⁵⁸ GBA, reference-no. 3 BJs 6/10-4, decision (Apr. 16, 2010) (public redacted version of Oct. 5, 2010). See *Heintschel von Heinegg & Dreist, The 2009 Kunduz Air Attack, supra* note 39.

an act constitutes a violation of the law of armed conflict. This question can only be answered in the course of a court proceeding that primarily has another goal than the establishment of a violation. The goal is either the establishment of individual criminal responsibility for an alleged violation or the verdict of the German state to pay compensation for an alleged violation of the law of armed forces. The administrative courts will assess the issue of Germany's responsibility.

100. A judgment granting compensation must establish two criteria: First, there must be a wrongful act, here of the law of armed conflict, and this wrongful act must have violate the subjective legal position/rights of the claimant.

D. SUBSTANTIVE CRIMINAL LAW

I. Basis for Criminal Jurisdiction / *ratione loci*

1. Principle of Universal Jurisdiction to Crimes under the VStGB

101. The VStGB applies to all criminal and other serious offences against international law designated under the VStGB even when the offence was committed abroad and if it bears no relation to Germany, § 1 VStGB. Germany therefore uses the principle of universal jurisdiction to adjudicate on war crimes.

102. Before the enactment of the VStGB, the general Criminal Code (StGB) limited the principle of universal jurisdiction to certain crimes, including genocide but leaving aside war crimes and crimes against humanity, which were not criminal offences as such before the year 2002. § 6 StGB on offences committed abroad against internationally protected legal interests provides:

German criminal law shall further apply, regardless of the law of the locality where they are committed, to the following offences committed abroad:

1. *(repealed)*;⁵⁹
2. offences involving nuclear energy, explosives and radiation under section 307 and section 308(1) to (4), section 309(2) and section 310;
3. attacks on air and maritime traffic (section 316c);

⁵⁹ Note by the authors: No. 1 used to include the crime of genocide, which is now a criminal offence under § 6 VStGB and therefore under the genuine principle of universal jurisdiction.

4. human trafficking for the purpose of sexual exploitation, for the purpose of work exploitation and assisting human trafficking (Sections 232 to 233a);
5. unlawful drug dealing;
6. distribution of pornography under sections 184a, 184b (1) to (3) and section 184c (1) to (3), also in conjunction with section 184d, 1st sentence;
7. counterfeiting money and securities (section 146, section 151 and section 152), credit cards etc and blank eurocheque forms (section 152b(1) to (4)) as well as the relevant preparatory acts (Sections 149, 151, 152 and 152b(5));
8. subsidy fraud (section 264);
9. offences which on the basis of an international agreement binding on the Federal Republic of Germany must be prosecuted even though committed abroad.

103. In practice this was not applied as the genuine principle of universal jurisdiction. By a restrictive interpretation of the wording of the StGB, the Federal Court of Justice concluded⁶⁰ that the application of the principle of universal jurisdiction was not prohibited by international law if a “legitimizing link” existed in every single instance of criminal prosecution, i.e. a link to Germany. In the case before the court that link existed, for the suspect was residing in Germany. The courts subsequently applied this restrictive approach. Shortly before the enactment of the VStGB the Federal Constitutional Court (BVerfG) ruled in an obiter dictum that this restrictive approach may have to be revised for the crime of genocide.⁶¹ Many authors

60 BGH, reference-no. 1 BGs 100/94, decision, *Verfolgung von Völkermord im Ausland* (Feb. 13, 1994), in 14(5) NSTZ 232 (1994).

61 BVerfG, reference-no. 2 BvR 1290/99, decision, *Geltung deutschen Strafrechts für Völkermord im Ausland* (Dec. 12, 2000), in 154(25) NJW 1848, 1852 (2001).

have concluded that the court also included war crimes in that obiter dictum,⁶² but this cannot be upheld in the presents authors' view.

104. After the entry-into-force of the VStGB, a change in the jurisprudence of the courts is not necessary to use the genuine principle of universal jurisdiction. This is due to a change in legislation. When drafting the VStGB parliament was well aware of the restrictive approach taken by the Federal Court of Justice (BGH). Because the German parliament intended to broaden the application of this principle, it especially made clear that a relation to Germany is not required under § 1 VStGB.⁶³ This regulations now stipulates:

This act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.

105. As can be seen from a comparison with the obiter dictum of the BGH, parliament rejected any restrictive approach to this principle. Consequently, German authorities may prosecute the crimes enlisted in the VStGB regardless of any “legitimizing link” to Germany. This means that the prosecution of war crimes may be investigated and assessed by German authorities, regardless of the location of the crime, the nationality of the perpetrator or of the victim and other such factors.

2. Application of the Principle of Universal Jurisdiction in Practice

106. As of today there is only one case in which this genuine principle of universal jurisdiction has been applied. Since May 2011 the higher regional court in Stuttgart is holding a trial against two individuals,

⁶² *Ambos, Völkerrechtliche*, *supra* note 42, at 434.

⁶³ ESER, SIEBER & KREICKER, *NATIONALE STRAFVERFOLGUNG*, *supra* note 3, at 252; BT-Drs. 14/8524 (Mar. 13, 2002), at 14.

Ignace Murwanashyaka and Straton Musoni.⁶⁴ Both accused face 26 counts of crimes against humanity and 39 of war crimes. They are accused of ordering militias to commit mass murder and rape in the Democratic Republic of the Congo between January 2008 and the date of their arrest in November 2009 from their residence in the German City of Mannheim.

107. It must be highlighted that the very broad approach taken by § 1 VStGB is limited in practice by the possibility to dispense with prosecution under § 153f StPO.⁶⁵ In the case on trial before the court in Stuttgart both accused had been residing in Germany for many years, so that the requirements of § 153f StPO were fulfilled.

3. Other Bases for Exercising German Criminal Authority

108. If an act is not to be considered a crime under the VStGB, it may still constitute a crime under general criminal law. Most of these crimes are enlisted in the Code of Criminal Law (*Strafgesetzbuch, StGB*). The Code of Criminal Law, as well as other codes, does not use the genuine principle of universal jurisdiction. General criminal law operates with the principles of territory (§§ 3, 4 StGB), of active personality (§ 7 [2] No. 1 StGB) or of passive personality (§ 7 [1] StGB), and it is applicable if an offence has been committed abroad against internationally protected legal interests (§ 6 StGB) or against domestic legal interests (§ 5 StGB). Therefore, the application of all general German criminal law is more restricted than the VStGB.

64 Press release (Mar. 4, 2011) by the OLG Stuttgart, *available at*: www.olg-stuttgart.de/servlet/PB/menu/1266093/index.html?ROOT=1182029; www.bbc.co.uk/news/world-africa-13275795.

65 Cf. *supra*, at 16 et seq.; *Ambos, Völkerrechtliche*, *supra* note 42, at 434.

II. Personal Scope of Application / jurisdiction *ratione personae*

109. The VStGB does not differentiate whether or not an alleged perpetrator is a member of the armed forces or a civilian. Both groups may commit war crimes. They are subject to the same criminal law. The issue of military or civilian superiors is a question of substantive criminal law and dealt with *infra*.⁶⁶

III. Violations of Law of Armed Conflict and War Crimes

1. War Crimes under the VStGB

110. The VStGB lists the acts that constitute war crimes in §§ 8-12 VStGB. Contrary to the Rome Statute the German law makes almost no distinction between LOIAC and LONIAC. It is a declared objective of the legislature to further assimilate the LOIAC with the LONIAC.⁶⁷ The VStGB is thus structured in a specific way: it differentiates between the different protected interests, and therefore uses the dichotomy between Geneva Law and Hague Law.⁶⁸ Accordingly, § 8 VStGB regulates war crimes against persons, § 9 VStGB war crimes against property and other rights, § 10 VStGB war crimes against humanitarian operations and emblems, § 11 VStGB war crimes with a view to the use of prohibited methods of warfare and § 12 VStGB war crimes consisting in employment of prohibited means of warfare. Consequently, the VStGB does not differentiate between serious/ grave breaches and other war crimes. This distinction has no relevance in German law, where the crimes are structured according to the interests they protect.⁶⁹

⁶⁶ Cf. *infra*, at 30 et seq.

⁶⁷ BT-Drs. 14/8524 (Mar. 13, 2002), at 23 et seq.

⁶⁸ *Id.*, at 14; Werle, *Einleitung*, *supra* note 2, at mn. 50.

⁶⁹ BT-Drs. 14/8524 (Mar. 13, 2002), at 25.

Another major difference between the war crimes of the Rome Statute and the war crimes of the VStGB is, that, while missing in the ICC-Statute, the VStGB lists all the sanctions and penalties available along with the criminal offence.⁷⁰

111. When drafting the VStGB, German legislatures intended to overtake the entire international customary criminal law regarding war crimes and transform these crimes into German law.⁷¹ Two issues received special focus: On the one hand, parliament did not want to establish crimes not provided for by international law. It was feared that this would be regarded a violation of the principle of sovereign equality by other states.⁷² But the VStGB was drafted to include all crimes under customary law and is therefore broader than art. 8 ICC-Statute.⁷³ On the other hand, the German parliament wanted to ensure that national authorities may investigate and prosecute every alleged offense and thus that German criminal procedure may ban the ICC from exercising its jurisdiction over German nationals, art. 17 ICC-Statute.⁷⁴ Thus, not only did parliament want to exclude any act not recognized by customary law, but to include every crime recognized by customary law. This is illustrated by table 1.

⁷⁰ Werle, *Einleitung*, *supra* note 2, at mn. 47.

⁷¹ BT-Drs. 14/8524 (Mar. 13, 2002), at 1.

⁷² *Id.*, at 14.

⁷³ *Id.*, at 23; Ambos, *Vorbemerkung*, *supra* note 9, at mn. 14.

⁷⁴ BT-Drs. 14/8524 (Mar. 13, 2002), at 12; ESER, SIEBER & KREICKER, *NATIONALE STRAFVERFOLGUNG*, *supra* note 3, at 64 et seq.

§ 8 VStGB war crimes against persons	§ 9 VStGB war crimes against property and other rights	§ 10 VStGB war crimes against humanitarian operations and emblems	§ 11 VStGB war crimes consisting the use of prohibited methods of warfare	§ 12 VStGB war crimes consisting in employment of prohibited means of warfare
ICC-Statute				
Article 8 (2) a) i) Article 8 (2) a) ii) Article 8 (2) a) iii) Article 8 (2) a) v) Article 8 (2) a) vi) Article 8 (2) a) vii) Article 8 (2) a) viii)	Article 8 (2) a) iv)			
Article 8 (2) b) vi) Article 8 (2) b) viii) Article 8 (2) b) x) Article 8 (2) b) xv) Article 8 (2) b) xxi) Article 8 (2) b) xxii) Article 8 (2) b) xxvi)	Article 8 (2) b) xiii) Article 8 (2) b) xiv) Article 8 (2) b) xvi)	Article 8 (2) b) iii) Article 8 (2) b) vii) Article 8 (2) b) xxiv)	Article 8 (2) b) i) Article 8 (2) b) ii) Article 8 (2) b) iv) Article 8 (2) b) v) Article 8 (2) b) ix) Article 8 (2) b) xi) Article 8 (2) b) xii) Article 8 (2) b) xxiii) Article 8 (2) b) xxv)	Article 8 (2) b) xvii) Article 8 (2) b) xviii) Article 8 (2) b) xix) Article 8 (2) b) xx
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Additional Protocol I				
Article 11 Abs. 1 Satz 2 Article 11 Abs. 2a Article 11 Abs. 2b Article 11 Abs. 2c Article 11 Abs. 4 Article 85 Abs. 4a Article 85 Abs. 4b Article 85 Abs. 4c Article 85 Abs. 4e		Article 85 Abs. 3f	Article 85 Abs. 3a Article 85 Abs. 3b Article 85 Abs. 3c Article 85 Abs. 3d Article 85 Abs. 4d	
2 nd Hague protocol of 1999				
			Article 15	

Table 1: Synopsis of war crimes in German and international legislation⁷⁵

75 BT-Drs. 14/8524 (mar. 13, 2002), at 24, translation by the authors of this report.

2. Prerequisites for War Crimes under the VStGB

112. Common to all war crimes is the prerequisite that they can only be committed during an armed conflict. Consequently, the war crimes under the VStGB all require that the act in question must be committed “in connection with an armed conflict” (see chapeau of §§ 8, 9, 10, 11 and 12 VStGB). This element is the international element required to render an act an internationally recognized crime.⁷⁶ Accordingly, any act that is committed only on the occasion of an armed conflict is excluded from the VStGB.⁷⁷

113. Until today, there are two instances in which war crimes were assessed: the case against Colonel Klein and Master Sergeant Wilhelm and the case against Ignace Murwanashyaka and Straton Musoni. In both cases, the issue of connection with an armed conflict did not pose a problem. Therefore there is no case law available to define the term “in connection”. Literature offers two criteria: whether or not the act could have been committed in peacetime and whether or not the existence of the armed conflict has facilitated the act and has deteriorated the position of the victim.⁷⁸

114. It is widely recognized in the literature that the existence of an armed conflict is an objective requirement that must be assessed on the basis of the facts on the ground – not on the basis of political statements. Additionally, the perpetrator must have *mens rea* that he is acting in connection with an armed conflict.⁷⁹

⁷⁶ *Ambos, Vorbemerkung, supra* note 9, at mn. 34.

⁷⁷ Cf. *infra*, at 28 et seq., on the applicability of general German law.

⁷⁸ *Ambos, Vorbemerkung, supra* note 9, at mn. 35.

⁷⁹ Cf. only *Ambos, Vorbemerkung, supra* note 9, at mn. 36.

IV. Command Responsibility

115. Starting point for the national legislation regulating the criminal responsibility of military or civilian superiors was art. 28 ICC-Statute. The VStGB regulates this international regulation in three different provisions – §§ 4, 13 and 14 VStGB –, which can be distinguished in two different dogmatic aspects. First, § 4 VStGB provides for a genuine criminal responsibility of superiors in case of ordering crimes under the VStGB or of omitting to prevent crimes under the VStGB by his/her subordinates. Second, §§ 13, 14 VStGB establishes a criminal responsibility for the violation of the duty of supervision and the omission to report a crime. There is no statute of limitation to prosecute the first kind of offence (§ 5 VStGB) while the crimes under §§ 13, 14 VStGB are not prosecutable without time limit. The time limit is set by general criminal law, which is applicable due to § 2 VStGB, and is set at five years, § 78 (1) 4 StGB.

1. Responsibility of Military Commanders and Other Superiors, § 4 VStGB

116. The offence under § 4 VStGB is without precedent in German law. Until the enactment of the VStGB the mere support of a crime by inaction was not punishable as the crime itself. § 4 VStGB provides:

Responsibility of military commanders and other superiors

(1) A military commander or civilian superior who omits to prevent his or her subordinates from committing an offence pursuant to this Act shall be punished in the same way as a perpetrator of the offence committed by that subordinate. Section 13 subsection (2) of the criminal Code shall not apply in this case.

(2) Any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to a military commander. Any person effectively exercising command and

control in a civil organization or in an enterprise shall be deemed equivalent to a civilian superior.

§ 13 (2) of the Criminal Code provides, together with § 49 (1) StGB, a mandatory mitigation of a sentence. This option is not available to perpetrators of § 4 VStGB.

117. The Federal Court of Justice held that a military superior is someone who has the factual authority, which may be based on law, to issue binding orders to subordinates and to enforce such an order.⁸⁰ The Court restricted the applicability of § 4 VStGB by holding that the actual possibility for the superior to order his/her subordinates and to prevent them from committing crimes is decisive for a fulfilment of § 4 VStGB. The legal status or rank alone is not sufficient to establish responsibility.⁸¹ The qualification as a military superior is not limited to a certain rank or level in the military hierarchy, but high- and low-ranking officials can be considered military superiors. Consequently, several military superiors could be held responsible for a single crime. This even holds true for members of a body that collectively has superiority in the sense of the Court's jurisprudence.⁸²

118. According to § 4 VStGB, the superior must have omitted to prevent crimes by his/her subordinates. It remains unclear how this omission is established and what action is sufficient to exclude it.⁸³ It is either possible to require an action that really prevents the crime from happening or to require that the superior has done everything feasible, appropriate and necessary to prevent the crime from happening even if the crime has happened anyway. It remains to be seen how the courts will decide on this matter.

80 BGH, reference-no. AK 3/10, decision (Jun. 17, 2010), at mn. 36.

81 *Id.*, Concurring Boris Burghardt, *Die Vorgesetztenverantwortlichkeit nach Völkerstrafrecht und deutschem Recht (§ 4 VStGB)*, 5(10) ZIS 695, 705 (2010) (hereinafter: *Burghardt, Die Vorgesetztenverantwortlichkeit*).

82 BGH, reference-no. AK 3/10, decision (Jun. 17, 2010), at mn. 36.

83 Explicitly leaving the question unanswered *Id.*, at mn. 38.

119. With § 4 VStGB the German law takes a more restrictive approach to command responsibility than international law and the ICC-Statute. In contrast to art. 28 ICC-Statute,⁸⁴ negligence is not sufficient to establish criminal responsibility. This is due to reasons of constitutional law.⁸⁵ It is necessary that the superior knows that he is a superior, that the perpetrator-to-be is his/her subordinate, that a crime was about to be committed, and that the crime was discernable to the superior and he/she knew he/she could prevent the crime.⁸⁶ The degree of knowledge of the future crime remains unclear. The Federal Court of Justice left unanswered the question of how detailed the knowledge of the superior regarding the act to be committed must be. From the positive perspective the superior does not to know the crime in all aspects – as he would need to know in a case under general German criminal law. This follows, according to the Federal High Court, from the fact that § 4 VStGB is based on international law, which is not as developed as German law. From the negative perspective there is no individual criminal responsibility if the crime committed is of a different quality than perceived by the superior. For this, the Court gives the example of pillage instead of a rape.⁸⁷

2. Application of § 4 VStGB in Practice

120. Until today, the offence of responsibility of military commanders and other superiors under § 4 VStGB was invoked once. It is the base of the trial before the court in Stuttgart. The suspect brought forward an appeal against his detention while awaiting trial. The Federal Court of Justice had to decide on the preliminary question whether or not the accused was a military superior in the meaning of § 4 VStGB. It decided that such a military superior is someone who has the factual authority, which may be

84 *Burghardt, Die Vorgesetztenverantwortlichkeit*, *supra* note 81, at 703, sees a relation to art. 25 (3) ICC-Statute, not to art. 8 ICC-Statute.

85 *Id.*, at 696.

86 BGH, reference-no. AK 3/10, decision (Jun. 17, 2010), at mn. 40.

87 *Id.*, at mn. 41 et seq., Concurring *Burghardt, Die Vorgesetztenverantwortlichkeit*, *supra* note 81, at 709 et seq.

based on law, to issue binding orders on subordinates and to enforce such an order.⁸⁸

121. The accused Ignace Murwanashyaka is the alleged leader of the “Forces Démocratiques de Libération du Rwanda” (FDLR). The prosecution claims that the members of the FDLR in the Congo have committed war crimes in the east of Congo during the years 2008 and 2009. The court held that the suspect was the superior of the FDLR troops in the Congo and that he knew about the crimes committed there. This finding was based on the evidence collected by the prosecution which proved to the court that the suspect

- enjoyed absolute authority within the FDLR,
- was the formal head of the FDLR,
- was also the actual head in the chain of command,
- communicated at all times with the forces in the Congo,
- was continuously informed by the forces in the Congo about the military operations and the military situation in the Congo,
- initialized strategic plans for the FDLR,
- decided on military plans that were given to him in order to decide about them,
- was known by name to the forces in the Congo, even by members of a lesser rank,
- was aware of the strategy of the FDLR to attack the civilian population in the Congo,
- was aware of the raping, pillaging, kidnapping and killing in the Congo and

88 BGH, reference-no. AK 3/10, decision (Jun. 17, 2010), at mn. 36.

- was in a position to enforce his orders, including “getting rid” of members that were not abiding to his orders.⁸⁹

All those facts lead the Court to conclude that the suspect is a military superior within the meaning of § 4 VStGB.

3. The Violation of the Duty of Supervision and the Omission to Report a Crime, §§ 13, 14 VStGB

122. The violation of the duty to supervise his/her subordinates and to report a committed crime is the second class of possible criminal offences that can be committed by superiors. In contrast to § 4 VStGB the offences under §§ 13, 14 VStGB cannot only be committed with intent but also out of negligence.

123. It is important to note that according to the structure of the *Völkerstrafgesetzbuch* the offences under §§ 13, 14 VStGB are not subject to the principle of universal jurisdiction. Therefore, they may only be investigated and prosecuted under the other principles of exercising criminal jurisdiction. This is not to be overestimated, for §§ 13, 14 VStGB are of only secondary importance and apply only to offences that protect the interests of military discipline and effective criminal prosecution.

4. Defence of Superior Orders

124. German law deals with the issue of defence of superior orders in the VStGB as well as in other legislative acts. For the purpose of the violations of the law of armed conflict and the perpetration of war crimes § 3 VStGB provides:

⁸⁹ *Id.*, at mn. 19.

Whoever commits an offence pursuant to sections 8 to 14 in execution of a military order or of an order comparable in its actual binding effect shall have acted without guilt so far as the perpetrator does not realize that the order is unlawful and so far as it is also not manifestly unlawful.

While international law only knows of “defences”, German law distinguishes between different forms of defences for a criminal offence, which are “justifications” and “excuses”. If an offence is justified, an act is not considered a violation of the law. If a conduct is excused, the act itself remains unlawful but the perpetrator is without guilt, and can therefore not be held criminally responsible.⁹⁰ Although worded slightly differently, the structure of § 3 VStGB is identical to the disciplinary law of members of German armed force, § 5 (1) WStG, § 11(2) SG.

125. German law furthermore differentiates between two different forms or orders. The first are binding orders. They must be followed, otherwise the subordinate may be punishable for insubordination, § 19 WStG. Following such an order may lead to the exclusion of criminal responsibility for the acting subordinate.

The second are non-binding orders. They can be simply non-binding, e.g. if an order demands private acts from a subordinate. Or they may not be binding because the order is unlawful and, consequently, the execution of such an order would be unlawful itself. If the subordinate is still complying with such an order, he may be criminally responsible for the crime committed.

126. The crux of the matter is, when an order is manifestly unlawful. The Federal Constitutional Court elaborated on the question in the cases of the shootings at the Berlin Wall. It held that the obviousness/manifestation

90 ESER, SIEBER & KREICKER, NATIONALE STRAFVERFOLGUNG, *supra* note 3, at 302.

must not be assessed subjectively from the standpoint of the perpetrator. It must be measured against a reasonable person that is not an ideal and perfect human being, but a person of average.⁹¹ For the cases of the Berlin Wall, decisive factors for the establishment of “manifestly unlawful” were the facts known to the perpetrator that had to be judged from the perspective of the reasonable and average person. This jurisprudence may be used to assess the issue of “manifestly unlawful” with regard to war crimes.⁹²

To summarize, an order will be “manifestly unlawful” in most cases of war crimes. Only in “petty war crimes” such unlawfulness may not be established.⁹³ This means that for most violations of the law of armed conflict that amount to war crimes, an order ordering the commitment will be manifestly unlawful, must not be complied with and the criminal responsibility of the perpetrator follows.

127. The provision of § 3 VStGB elaborated upon above pertains only to war crimes. Crimes against humanity as well as genocide must be assessed under provisions of general criminal law.

V. Application of General Criminal Law

128. The VStGB is the *lex specialis* to the general German criminal law and applies to violations of the law of armed conflict which amount to war crimes. Besides the VStGB, general criminal law remains applicable in principle. This is envisaged by the VStGB itself, which states in § 2 VStGB:

The general criminal law shall apply to offences pursuant to this

91 BVerfG, NJW 929, 932 (1997); BGH, NJW 141, 149 (1993); BGH, NJW 1932, 1939 (1993); BGH NStZ 488 (1993).

92 ESER, SIEBER & KREICKER, NATIONALE STRAFVERFOLGUNG, *supra* note 3, at 313 et seq.

93 *Id.*, at 315.

act so far as this act does not make special provision in section 1 and 3 to 5.

This was intended by parliament⁹⁴ and is recognized by the GBA⁹⁵ and by the literature.⁹⁶ Thus, as far as the VStGB does not regulate criminal conduct completely, war crimes and other crimes against international law are subject to general German criminal law.

129. As regards the relationship between the VStGB and general criminal law it is important to note that any violation of the law of armed conflict will be prosecuted under the VStGB. Only such offences which are committed without any relation or connection to an armed conflict can be assessed under the StGB. For example, while theft in connection with an armed conflict is to be regarded as looting and therefore will be assessed under the VStGB, a theft without any connection to the conflict is “regular” theft and will be assessed under the StGB. As regards the basic principles of criminal liability, these are mainly to be found in the StGB and provide rules that are of overall importance, namely with regard to the applicability of German law, jurisdiction *ratione loci et temporis*, attempt, omissions and justifications for an offence, etc. As long as the the VStGB does not provide for regulations regarding these questions, the general law of the StGB remains applicable. The main changes provided for by the VStGB concern the applicability of German law through the principle of universal jurisdiction as well as the issue of command responsibility.

130. Accordingly, general criminal law may be important in two respects: (1) with regards to the basic principles of criminal liability and (2) with regard to the special part, i.e. the crimes themselves.

94 BT-Drs. 14/8524 (Mar. 13, 2002), at 14 et seq.

95 GBA, reference-no. 3 BJs 6/10-4, decision (Apr. 16, 2010) (public redacted version of Oct. 5, 2010), at 51 et seq.

96 ESER, SIEBER & KREICKER, *NATIONALE STRAFVERFOLGUNG*, *supra* note 3, at 76 et seq.; Thomas Weigend, § 2 *Anwendung des allgemeinen Rechts*, at mn. 1 et seq., in 6(2) MÜKo ZUM StGB (2009).

First, general law, and not the VStGB, mainly regulates the foundations of criminal liability, i.e. regulations concerning attempt, defences, and participation. The VStGB does not provide any regulation for attempt. Thus, the general provision regarding attempt (§ 22 StGB) remains applicable. The same holds true for defences for a criminal act except the defence of superior orders for war crimes, which is regulated in § 3 VStGB and was explained *supra*. Besides that German criminal law provides a justification / excuse if a perpetrator acted in self-defence (§ 32 StGB), in excessive self-defence (§ 33 StGB), in necessity (§ 34 StGB) or under duress (§ 35 StGB). The general law provides rules for abetting (§ 26 StGB) and aiding (§ 27 StGB) in a crime. These rules are almost identical to art. 25 (3) ICC-Statute, even if the German and the international rules are structured in a different way and labelled differently.⁹⁷

131. Second, the VStGB regulates certain crimes. It establishes the criminal responsibility for certain acts. If a violation of the law of armed conflict is perpetrated within an armed conflict or in connection with an armed conflict, this act may be considered a war crime. If an act is committed only on the occasion of an armed conflict, this act cannot be considered a war crime under the VStGB. But, because general criminal law remains applicable, the act may be a crime under general criminal law, e.g. murder, theft etc. In this line the GBA assessed whether or not the conduct of Colonel Klein could be considered any other criminal act besides a crime under the VStGB.⁹⁸ Even if an act cannot be considered a crime either under the VStGB or under general criminal law, it may be considered a malfeasance and thus the perpetrator may be subject to disciplinary sanctions. Even if IHL or Public International Law provide no criminal sanction for a violation of a rule, German domestic law may sanction a certain conduct⁹⁹ If an act is to be considered a crime under

97 *Id.*, at mn. 17.

98 GBA, reference-no. 3 BJs 6/10-4, decision (Apr. 16, 2010) (public redacted version of Oct. 5, 2010), at 51 et seq.

99 ESER, SIEBER & KREICKER, NATIONALE STRAFVERFOLGUNG, *supra* note 3, at 302; MATERIALIEN ZUM VStGB

the VStGB and the StGB, and probably even as a malfeasance, general criminal law provides that the VStGB is the *lex specialis*.¹⁰⁰

132. If the VStGB is inapplicable to acts committed by members of the German armed forces abroad, the substantial regulations of general German criminal law (the criminal offences) will apply to such offences if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender was German at the time of the offence (§ 2 StGB).

Moreover, the basic principles of criminal law (attempt, justifications etc.) apply extraterritorially by virtue of § 1 VStGB that establishes the principle of universal jurisdiction. However, this application is limited by § 2 VStGB which provides certain regulations of overall importance which apply only to crimes under the VStGB (mainly the issue of command responsibility).

VI. Relevant Case Law

1. Case against Colonel Klein and Master Sergeant Wilhelm

133. The first major case concerning alleged war crimes of German nationals was the air attack near Kunduz, Afghanistan, on 4 September 2009.

As established by the GBA, the facts of that case are as follows.¹⁰¹

134. The overall situation in the region around Kunduz, Afghanistan,

24 (S. R. Lüder & Th. Vormbaum eds., 2002).

100 *Ambos, Vorbemerkung, supra* note 9, at mn. 45 et seq.

101 GBA, reference-no. 3 BJs 6/10-4, decision (Apr. 16, 2010) (public redacted version of Oct. 5, 2010), at 13 et seq.

deteriorated in the months prior to 4 September 2009. Every day one or two warnings regarding suicide-attacks were registered with the Provincial Reconstruction Team Kunduz. Since May 2009 German soldiers were engaged in hostilities on a daily base. In July 2009 it became known that the insurgents in Afghanistan were planning a complex attack on the PRT including at least two vehicles. Similar attacks had already occurred in the past, including five attacks in 2009 with fuel trucks, the last attack on 25 August killing 47 and injuring 70 people.

135. On 3 September 2009 two fuel trucks were on their way to a contractor of ISAF. One truck broke down and had to be repaired. This took place approximately eight kilometres to the southwest of the PRT-camp. A small group of Taliban-fighters took possession of the two trucks, killing one driver instantly and kidnapping the other driver. The insurgents then fled with the trucks. While crossing over the river Kunduz, one truck got stuck on a sandbank. This was about 7 kilometres from the PRT-camp. The next building was about 205 meters away, but it could not be established whether this building was inhabited at the time. The next inhabited buildings were about 850 meters to the northeast, 1150 meters to the northwest and 1.400 meters to the southeast. The surviving driver later reported that around 56 to 70 Taliban were present on site, this included low- and middle-rank fighters. The Taliban called for help and other fighters arrived at the site, along with civilians from a close-by village. It could not be established whether or not the civilians were forced to come. It was established that they carried cans to transport fuel.

136. At approximately 21.00 hours the PRT was informed. Already at approximately 20.00 hours a German task force was informed by an informant on the ground. The task force informed Colonel Klein, commanding officer of the PRT. The informant claimed that the trucks were to be used for attacks on civilians and ISAF-troops. Remembering the attack of 25 August 2009, Colonel Klein believed that the trucks were to

be used as suicide-devices against his or allied forces. At the time Master Sergeant Wilhelm was Joint Tactical Air Controller (JTAC) of the PRT Kunduz. Colonel Klein ordered the JTAC to order a surveillance plane, that was already in flight, to search for the two trucks. At approximately 24.00 hours Colonel Klein received the information that the insurgents could not move the trucks and therefore tried to empty the trucks. Additionally, it became known that some more Taliban-leaders had gathered at the scene. These leaders were known by name to Colonel Klein and Master Sergeant Wilhelm. The trucks were discovered at approximately 00.15 hours on 4 September with approximately 100 individuals surrounding the trucks. From that time on Colonel Klein was in steady contact with the informant.

137. The surveillance pictures showed the two trucks and two other vehicles, supposedly one pick-up and one tractor. The sandbank itself was known as a passageway of the insurgents. Colonel Klein was informed that the individuals present at the sandbank were to a large amount insurgents. Following Colonel Klein's orders, the crew of the aircraft identified small arms and rocket propelled grenades. Master Sergeant Wilhelm later stated that he also identified a machine-gun mounted to the pick-up.

138. At 00.30 hours the informant reported that several Taliban and no civilians were at the scene. Colonel Klein ordered the assessment of the weapons that were necessary to destroy the trucks without damage to the surrounding buildings. At 00.39 hours he asked allied forces if troops were close to the trucks and could be injured by a possible air strike.

139. At approximately 01.00 hours ISAF headquarters in Kabul informed Colonel Klein that air support was only to be given if ISAF-troops were in contact with the Taliban. Colonel Klein then declared "troops-in-contact" because of an "imminent threat" to the PRT-camp. He knew that this was not a literal interpretation of "troops in contact". At approximately 01.08 hours two ISAF aircraft were in the region and contacted Master Sergeant

Wilhelm. They claimed that around 50 to 70 insurgents were present. Starting at 01.17 hours Colonel Klein and Master Sergeant Wilhelm could follow a live-video from the scene.

140. After talking to the informant on the ground at least seven times, at 01.40 hours Colonel Klein ordered the air strike against both trucks.

Colonel Klein was of the opinion that this location was Taliban-area even by day and that civilians would avoid the area at all times. Given the time of the day, he was certain that no civilians were at the scene.

Colonel Klein decided against a mere show of force, for he was of the opinion that the insurgents on the ground had heard the noise of the planes which had been flying above their heads for hours. In the past, Colonel Klein had made the experience that even a low-altitude show of force was unsuccessful.

141. The number of persons killed could not be established. Before noon of 4 September 2009 Afghan police investigated the scene. They discovered, among other things, human remains. When ISAF inspected the scene at approximately 12.30 hours the human remains had already been taken away. The number of killed individuals is estimated at around 50 by the GBA, while others, especially the legal representative of the victims, allege that 142 persons were killed.

142. The conduct of the two members of the German armed forces, Colonel Klein and Master Sergeant Wilhelm, was investigated in the manner described above.¹⁰² The investigations related to violations of the law of armed conflict and therefore possible war crimes. The prosecuting GBA decided not to indict the two, for the office could not find any criminal

¹⁰² See *supra*, at chapter C.

wrongdoing.¹⁰³ The prosecution could, first of all, not establish any intent of the acting officers. Second, the GBA emphasized the fact that it could not investigate the situation on site. The GBA gave the example that it was not possible to exhume the bodies and conduct an autopsy on the dead.

143. In accordance with the procedures described above, and after the suspension of the criminal proceedings had ended (by virtue of the final decision of the GBA), the matter was dealt with by the military for consideration of disciplinary proceedings. Although the report of the GBA could have given rise to disciplinary charges against Colonel Klein who may have acted contrary to the Rules of Engagement, the disciplinary proceedings were dismissed.

2. Violence against Civilians at Checkpoints

144. There are two instances in which German authorities have instituted investigations against members of the German armed forces.

In the first case, German forces set up a checkpoint in Afghanistan and injured five civilians in October 2008. The German forces suspected an improvised explosive device at a street and set up the checkpoint to inspect the scene. The platoon's commanding officer ordered that cars approaching the checkpoint must be warned and stopped before they reached the checkpoint. In order to do so, he set up a to-do-list. First, the soldiers were obliged to fire a flare gun; second, the laser of the guns should be used to project a red dot on the windshield of approaching cars; third, from a distance of 100m onwards the soldiers should fire warning shots from the machine gun and, fourth, from a distance of 50m shots were to be fired at the front of the car to destroy the engine. Minutes after the checkpoint was set up, a car approached at high speed. The soldiers followed the orders of the commanding officer. The car was stopped when the soldiers fired at the

103 GBA, reference-no. 3 BJs 6/10-4, decision (Apr. 16, 2010) (public redacted version of Oct. 5, 2010).

engine and the car turned away. Inside were six civilians on their way to bring a dead family member to another province of Afghanistan. Five of the six civilians were injured, four of them needed to be treated surgically.

145. Three German soldiers were subjected to investigations by the prosecutor of Zweibrücken, but this investigation did not lead to an indictment.¹⁰⁴ The prosecutor did not find any criminal wrongdoing. First, the soldiers mistakenly assumed the existence of an attack against the checkpoint. Second, taken into account all the facts and judging from an ex ante perspective, the soldiers could not have avoided their misconception. Third, just days before the attack a suicide-attack had killed two soldiers of the same platoon and this earlier attack was conducted in a similar manner as the assumed attack. This gave their statements enhanced credibility.

146. The second case is similar to the first one. Together with Afghan armed forces German armed forces set up a checkpoint near Kunduz, Afghanistan, during a night in August 2009. The objective of this checkpoint was to prevent arms smuggling. While setting up the checkpoint, two cars approached the checkpoint at high speed. Afghan and German soldiers called and signalled the cars to stop, but the cars continued towards them. When the soldiers targeted the windshields with laser, the cars stopped suddenly, backed up and continued their ride towards the soldiers. Thereupon the soldiers fired warning shots. When the cars did not react, one German non-commissioned officer fired at one car, killing three civilians. The other car fled.

147. The Master Sergeant was subjected to investigations. The prosecutor found that, first, the soldier mistakenly assumed the existence of an attack against the checkpoint. Second, taken into account all the facts and judging from an ex ante perspective, the soldier could not have avoided

¹⁰⁴ Staatsanwaltschaft Zweibrücken (Office of the Prosecutor Zweibrücken), reference-no. 4129 Js 12550/08, decision (Jan. 23, 2009) *in* 51(4) NZWehrR 169 (2009).

his misconception. Moreover, the prosecutor could not find any negligent conduct. Therefore the investigation was terminated and the soldier was not indicted.¹⁰⁵

¹⁰⁵ Staatsanwaltschaft Frankfurt (Oder) (Office of the Prosecutor Frankfurt [Oder]), reference-no. 244 Js 29960/08, decision (May 15, 2009), not published.

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APPENDIX II. TABLE OF ABBRIVIATIONS

AP 1	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
AP 2	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non–International Armed Conflicts (Protocol II)
art.	Article
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGBL	Bundesgesetzblatt (Federal Law Gazette)
BGH	Bundesgerichtshof (German Federal Court)
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen (Decisions of the German Federal Court in Criminal Matters)
BKA	Bundeskriminalamt (Federal Criminal Police Office)
BKAG	Bundeskriminalamtsgesetz (Code of the Federal Criminal Police Office)
BMVg	Bundesministerium der Verteidigung (German Federal Ministry of Defence)
BverfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BverfGE	Entscheidungen des Bundesverfassungsgerichts (Decisions of the German Federal Constitutional Court)
BverwG	Bundesverwaltungsgericht (German Federal Administrative Court)
GBA	Generalbundesanwalt beim Bundesgerichtshof Karlsruhe (Federal Prosecutor General)
GC1	Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GC2	Geneva Conventions for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea
GC3	Geneva Conventions relative to the Treatment of Prisoners of War
GC4	Geneva Conventions Relative to the Protection of Civilian Persons in Time of War
GG	Grundgesetz für die Bundesrepublik Deutschland (Basic Law)
GVG	Gerichtsverfassungsgesetz (Courts Constitution Act)
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court

IHL	International Humanitarian Law
LOIAC	law of international armed conflicts
LONIAC	law of non–international armed conflicts
mn.	Margin
MüKo	Münchener Kommentar zum Strafgesetzbuch
OLG	Oberlandesgericht (higher regional court)
PRT	Provincial Reconstruction Team
SG	Soldatengesetz (Code of Law for Members of Armed Forces)
StGB	Strafgesetzbuch (German Criminal Code)
StPO	Strafprozessordnung (German Code of Criminal Procedure)
VStGB	Völkerstrafgesetzbuch (Code of Crimes against International Law)
WDO	Wehrdisziplinarordnung (Military Disciplinary Regulation)
WStG	Wehrstrafgesetz (Code of Crimes committed by Members of the Armed Forces)
ZDV 15/2	Zentrale Dienstvorschrift 15/2 – Humanitäres Völkerrecht in bewaffneten Konflikten (Internal Regulation of the Ministry of Defence regarding the Law of Armed Conflict)

APPENDIX III. TABLE OF NATIONAL LEGISLATION AND INTERNATIONAL TREATIES

Beamtenstatusgesetz (BeamStG, Code on the Status of Civil Servants) of 17 June 2008, as last amended on 5 February 2009, BGBl. 2009 I, p. 160

Bundeskriminalamtgesetz (Code of the Federal Criminal Police Office) of 7 June 1997, as last amended on 6 June 2009, BGBl. 2009 I, p. 1226

Bürgerliches Gesetzbuch (Civil Law Code) of 18 August 1896, as last amended on 17 January 2011, BGBl. 2011 I, p. 34

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85

Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135

Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287

Gerichtsverfassungsgesetz (Courts Constitution Act) in the version published on 9 May 1975, as last amended on 22 December 2010, BGBl. 2010 I, 2300

Grundgesetz für die Bundesrepublik Deutschland (Basic Law) of 23 May 1949, as last amended on 21 July 2010, BGBl. 2010 I, 944

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 UNTS 3

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non–International Armed Conflicts (Protocol II) of 8 June 1977, 1125 UNTS 609

Rome Statute of the International Criminal Court of 17 July 1988, 2187 UNTS 3

Soldatengesetz (Code of Law for Members of Armed Forces) of 30 May 2005, as last amended on 28 April 2011, BGBl. 2011 I, p. 678

Strafgesetzbuch (Criminal Code) in the version promulgated on 13 November 1998, as last amended on 28 April 2011, BGBl. 2011 I, 676

Strafprozessordnung (Code of Criminal Procedure) of 7 April 1987, as last amended on 22 December 2010, BGBl. 2010 I, 2300

Völkerstrafgesetzbuch (Code of Crimes against International Law) of 26 June 2002, BGBl. 2002 I, 2254

Wehrdisziplinarordnung (Military Disciplinary Regulation) of 16 August 2001, last amended on 17 December 2008, BGBl. 2008 I, p. 2586

Wehrstrafgesetz (Code of Crimes committed by Members of the Armed Forces) of 24 May 1974, last amended on 22 April 2005, BGBl. 2005 I, 1106

APPENDIX IV. TABLE OF CASES

BGH, reference–no. AK 3/10, decision of 17 June 2010 (case against Ignace Murwanashyaka and Straton Musoni)

GBA, reference–no. 3 BJs 6/10–4, decision of 16 April 2010 (public redacted version of 5 October 2010), available at <http://www.generalbundesanwalt.de/docs/einstellungsvermerk20100416offen.pdf>, (case against Colonel Klein et al.)

GBA, reference–no. 3 ARP 207/04–205 (first criminal complaint against Donald Rumsfeld et al.)

BVerfG, reference–no. 2 BvR 2/11, decision of 1 March 2011

BGH, reference–no. 3 StR 372/00, judgment of 2 February 2011

BGH, reference–no. 1 BGs 100/94, decision of 13 February 1994, NStZ 1994, p. 232 et seq.

BGH, reference–no. 5 StR 370/92, judgment of 3 November 1992, BGHSt 39, p. 1 et seq. = NJW 1993, p. 141 et seq.

BGH, reference–no. 5 StR 418/92, judgment of 25 March 1993, BGHSt 39, p. 168 et seq. = NJW 1993, p. 1932 et seq.

BGH reference–no. 5 StR 88/93, judgment of 8 June 1993, NStZ 1993, p. 488 et seq.

BVerfG, reference–no. 2 BvR 1851/94, decision of 24 October 1996, BVerfGE 95, p. 96 et seq. = NJW 1997, p. 929 et seq.

BVerfG, reference–no. 2 BvR 1290/99, decision of 12 December 2000, NJW 2001, p. 1848 et seq.

BVerwG, reference–no. II WD 13/68, 14/68, judgment of 11 July 1968, BVerwGE 33, 168 = NJW 1968, p. 2120 et seq.

OLG Stuttgart, reference–no. 5 Ws 109/05 (first criminal complaint against Donald Rumsfeld et al.), decision of 13 September 2005 = NStZ 2006, p. 117 et seq.

Staatsanwaltschaft Frankfurt (Oder) (Office of the Prosecutor Frankfurt [Oder]), reference–no. 244 Js 29960/08, decision of 15 May 2009, not published

Staatsanwaltschaft Zweibrücken (Office of the Prosecutor Zweibrücken), reference–no. 4129 Js 12550/08, decision of 23 January 2009 = NZWehrR 2009, p. 169 – 182

APPENDIX V. SYNOPSIS OF THE ISSUES ADDRESSED WITH REFERENCE TO THE QUESTIONNAIRE OF THE COMMISSION

1. GENERAL

- *Please provide a general description of the national system for investigating and prosecuting alleged LOAC violations. In particular, describe whether such cases are handled by the civilian or military justice systems.*

Cf. supra [29] et seq.

- *What acts are considered breaches of the LOAC?*

Every violation of the treaty or customary law applicable in armed conflict is considered a violation of the law of armed conflict, but not every violation entails criminal responsibility. A breach of the LOAC that entails criminal responsibility is every act that is considered a crime under national law and that is not lawful according to IHL and therefore not justified.

- *What breaches of LOAC are considered to be war crimes? Is the source of the designation as a “war crime” found in legislation or case law? Please elaborate.*

§§ 8 VStGB et seq. designate certain acts as war crimes under German law. Cf. supra [101] et seq.

- *What acts fall within any such legislation or case law?*

Cf. supra [101] et seq.

- *How are breaches of LOAC dealt with when they do not amount to war crimes?*

They may amount to malfeasances and these are examined by “Truppendienstgerichte” (civil courts tasked with proceedings concerning malfeasance by members of the armed forces), in lesser cases by the military superior. Cf. supra [116] et seq.

It must be borne in mind that a “Truppendienstgericht” does not deal with criminal proceedings regarding violations of armed conflict. The courts are established within the MoD. A hearing will in principle be held before a chamber of three judges. The presiding judge must be a civilian lawyer while the two associate judges are soldiers which were chosen by their respective military commanders and the administration of the courts to serve in proceedings before the “Truppendienstgericht”. The military lawyers serve as the “indicting” authority. To be clear: they indict disciplinary offences, not criminal offences. As a defence counsel the soldier may choose a lawyer. Any lawyer/attorney in Germany may serve as a defense counsel (§ 90 WDO). If the court deems it necessary it will commission an attorney, who is to be paid by the courts.

- *Is your country party to the International Criminal Court statute? If so, how does that influence the national system of investigation and prosecution regarding alleged LOAC violations?*

Germany is a state party to the Rome Statute of the International Criminal Court. The entry-into-force of the Statute has made a major impact on the German legal order, cf. supra [4] et seq.

- *Does your country treat human rights law as applicable in armed conflict? If so, on what basis and to what extent?*

Germany treats human rights as applicable in armed conflict for reasons of constitutional law and corresponding international obligations. The extent depends on the circumstances and cannot be assessed in an abstract fashion. There is no national case law regarding that question for the question has not arisen yet. Cf. supra [24] et seq.

- *Is your country subject to national or regional human rights tribunals or other fora which could investigate alleged LOAC violations (e.g. European Court of Human Rights)? If so, please briefly describe any key cases in that regard.*

Germany is a state party to the European Convention of Human Rights. The ECtHR may therefore investigate alleged violations of law of armed conflict. Again, this case has not arisen. Cf. supra [24]-[28].

- *What other possibilities are there for investigating possible LOAC violations (e.g. public inquiries, parliamentary hearings, special prosecutors)?*

If an alleged violation of law of armed conflict may amount to a criminal offence, only German courts may decide on the question. For constitutional law reasons, other authorities are banned from investigating. The military may investigate such a violation for internal reasons. The German parliament may have hearings about the alleged violation, but this hearing may only have political consequences.

- *What is the basis for criminal jurisdiction over breaches of LOAC in your country (territoriality, nationality, passive personality, protective)?*

Germany uses the principle of universal jurisdiction for war crimes, § 1 VStGB. Cf. supra [101] et seq.

- *Does the national war crimes legislation jurisdiction extend to members of the military? If so, under what circumstances?*

The German national war crimes legislation applies in all circumstances to members of the military.

- *Is there universal jurisdiction and how is such jurisdiction exercised?*

Germany uses the principle of universal jurisdiction for war crimes, § 1 VStGB. Currently the first trial under the principle of universal jurisdiction is conducted. Earlier cases which were based on the principle of universal jurisdiction were ruled under different standard that is not applicable anymore. Cf. supra [101] et seq.

- *Does your country deal with the issue of “command responsibility”? If so, how?*

§§ 4, 13, 14 VStGB. Cf. supra [115] et seq.

- *Does your country deal with the “defense of superior orders”? If so, how?*

§ 3 VStGB. Cf. supra [124] et seq.

2. THE CIVILIAN JUSTICE SYSTEM

- *What is the structure of the civilian system of justice and the role of civilian courts, the attorney general or an equivalent prosecution authority and the civilian police in general, and specifically regarding the investigation and prosecution of alleged LOAC violations?*

Cf. supra [36] et seq.

- *If there is an attorney general or similar individual in your country, what is his or her role, in particular with regard to incidents that involve possible LOAC issues or possible LOAC violations? Does he/she provide advice on legal matters, supervise subordinate prosecutors, oversee investigative or police personnel? Who has the authority to determine whether or not to prosecute? Is there any other relevant authority?*

There is a Federal Prosecutor General that is responsible for investigating and indicting alleged violations of law of armed conflict that may amount to war crimes. The GBA-Office is tasked with the aforementioned issues and the GBA is responsible for the investigation. His/her decisions may only be revised by a court, but not in every case. Cf. supra [38] et seq.

- *Do the civilian investigative authorities, including criminal investigators, act independently or are they subject to the direction of the prosecutor or other actors in the justice system?*

The prosecution is responsible for the investigation and therefore the prosecutors are superior to the investigating police. In the case of alleged violations of the law of armed conflict, the GBA cannot use the regular investigating police but must rely on the investigations conducted by the military police. The prosecution has no authority over military police. Cf. supra [34] et seq, [44] et seq..

What, if any, safeguards are in place (under law, regulation, policy or practice) to ensure the independence and impartiality of the various actors in the civilian justice system who might be involved in investigating or prosecuting possible LOAC violations? Is there any relevant case law?

Some decisions by the prosecution may be appealed against at a court.

There is one case in this regard (*supra* [83]).

- *If a matter is subject to a public inquiry and a criminal investigation how is the matter handled (criminal first/concurrent investigation, etc.)?*

There is no public inquiry of alleged violations of the law of armed conflict.

- *Are there specific laws applicable to members of civilian security services? If so, please briefly describe them.*

No, there are no specific laws applicable to members of civilian security services.

3. THE MILITARY JUSTICE SYSTEM

There is no military justice system. The existing civil court may act as “military courts” only in respect to malfeasances.

- *What breaches of LOAC fall under military law?*

There is no specific military law.

- *What options are available under military law for the investigation of possible LOAC violations (e.g., criminal investigations, boards of inquiry, operational command or unit level investigations)?*

The military authorities investigate alleged violations of law of armed conflict. Cf. *supra* [44] et seq.

- *Can civilians be the subject of such investigations?*

Military authorities only have the power to investigate wrongdoing by members of the armed forces. Civilians cannot be subject to military investigations.

- *Provide a general description of the structure of the military justice system and the role of military courts, prosecution authority (including any military AG/JAG or similar authority) and military police regarding the investigation and prosecution of breaches of LOAC?*

There is no military justice system.

- *What is the basis for jurisdiction over LOAC breaches under military law (territoriality, nationality, passive personality, protective jurisdiction)?*

There is no military justice system.

- *Who is subject to military law? Can military jurisdiction be exercised over civilians and if so under what circumstances?*

There is no military law except for disciplinary law. Only members of the armed forces and their civilian superiors (Minister of Defence etc.) are subject to that law.

- *What disciplinary or punitive actions can be taken when a violation of LOAC is determined to have occurred (e.g., censure, reprimand, discharge from service, imprisonment)?*

If the alleged violation amounts to a war crime, this issue is dealt with before civilian courts. If the violation does not amount to a war crime, the military superior may sanction the member of the armed forces (lesser violations) or a disciplinary court may sanction the member of the armed

forces (graver violations not amounting to criminal offences). Cf. [87] et seq.

- *Describe the leadership structure of the military legal system. If there is a military attorney general, JAG or equivalent person, what is the role of that individual? Does he/she provide advice to commanders, supervise the military legal system, oversee military justice? What are his/her authority within the military justice system and his/her relationship to military criminal investigators and other investigators?*

The military legal system only comes into play when a violation does not amount to a war crime but will be examined by a disciplinary court. The legal advisors of the armed forces will take a part in the proceedings (indicting). Cf. supra [33] et seq.

- *To whom does the aforementioned person report? What authority does that superior exercise over him or her?*

There is no military justice system.

- *What, if any, safeguards are in place (under law, regulation, policy or practice) to ensure the independence and impartiality of the various actors in the military who might be involved in the investigation or prosecution of alleged LOAC violations? Is there any relevant case law?*

The military superior who is in charge of investigating alleged violations of the law of armed conflict is under the regular chain of command. There is no case law in that regard.

- *Do military investigative authorities act independently or are they subject to the direction of commanders, military legal officers, prosecutors or other actors?*

The military investigative authorities act independently from actors outside of the military, although they cooperate very closely with the civilian authorities tasked with investigating alleged criminal offences. Cf. supra [44] et seq.

- *What is the role of the commander or other senior military personnel with regard to a possible LOAC violation? Is their involvement limited in any way? Do they shoulder any particular responsibilities?*

The military superior of an alleged offender is responsible for investigating the violation of the law of armed conflict which always amounts to a malfeasance. The investigating and prosecution of alleged war crimes is based on his/her findings. Cf. supra [47] et seq.

- *Is there civilian oversight over the military system and its various actors (e.g. courts, civilian attorney general)?*

Civilian courts solely handle alleged violations that amount to war crimes. If the act does not amount to a war crime but only to a malfeasance, a civilian court will decide on the matter. Only in the least serious cases the military superior may decide on sanctions. His/her decision is not subject to the civilian court system. Cf. supra [44] et seq.

4. APPLICATION OF THE POLICY IN PRACTICE

- *If the military and civilian systems both have authority over incidents involving possible LOAC violations, what are the criteria used to determine which system handles the matter? Specifically, explain the interface between civilian and military systems in the investigation and prosecution of alleged breaches of LOAC.*

If an alleged violation amounts to a war crime, only the civilian authorities are tasked with the investigation and prosecution. Cf. [44] et seq; [57] et seq.

- *What are the reporting requirements regarding allegations of wrongdoing (e.g. are allegations reported, to what authority and in what time period)?*

A military superior must start an investigation of an alleged violation of the law of armed conflict as soon as he/she is notified of the act. He/she is legally obliged to refer the matter to the civilian prosecutors as soon as he/she believes that the violation may amount to a criminal offence (war crime or other). Cf. supra [47] et seq, [57] et seq.

- *Can complaints of alleged LOAC violations be made directly to the military or the civilian police?*

They may be made to civilian or military police or to the prosecution.

- *What is the policy regarding investigation of an alleged LOAC violation by military personnel? Who decides whether an operational inquiry (e.g. by unit military personnel) or criminal investigation is conducted?*

The military superior is obliged by law to investigate every alleged violation of the law of armed conflict. He/she must assess, whether or not the act may amount to a criminal offence. If he/she determines that this is the case, he/she is obliged by law to refer the matter to the prosecution authorities. Cf. supra [44] et seq; [57] et seq.

In contrast to the practice in other States, there is no reporting requirement within the armed forces for certain categories of serious incidents.

- *Regarding such investigations, what are the criteria to launch an investigation or other inquiry (e.g. reasonable suspicion, belief that an offence has been committed, etc.)?*

The military superior is obliged to start an investigation as soon as facts become known to him, that justify the suspicion of a malfeasance. Cf. supra [44] et seq; [57] et seq.

- *If during an operational investigation or other inquiry by the chain of command it appears that a crime may have been committed, is it required that the matter be referred for criminal investigation? If so, under what circumstances?*

As soon as the military superior determined that the act in question may amount to a criminal offence, he/she is obliged to refer the matter to the prosecution authorities. This is required by law and if the military superior has failed to refer the matter to the competent authorities, he may be criminal responsible himself for the omission of the referral, § 14 VStGB. Cf. supra [57] et seq.

- *What circumstances in cases involving civilian death or injury or damage to civilian property require that an investigation or inquiry be conducted? Is there a requirement that every death or every civilian death be investigated? Is this a legal requirement or one of policy? Does it extend to cases in which a military objective is attacked and collateral damage or incidental injury occurs?*

As soon as there is the suspicion of a criminal act this suspicion must be followed. Cf. supra [57] et seq.

- *What access do affected civilians, including non-citizens and residents of other countries, have to the investigation, its results and any court proceedings?*

Cf. supra [91] et seq.

- *What role, if any, do human rights groups have in initiating or conducting any inquiry into alleged LOAC violations?*

Human rights groups may report an alleged criminal offence to the prosecution authorities or the police - just like every other individual may do so. They have no special powers in that regard. Cf. supra [75] et seq; [91] et seq.

- *Please provide available statistics regarding the investigations or other inquiries and prosecutions of alleged LOAC violations (e.g. numbers of complaints, matters investigated, charges laid, non-judicial action, trials, verdicts - please include civil and military).*

The GBA, which is responsible with the investigation, is reluctant to publish statistics. This is due to protection of ongoing investigations.¹¹⁰⁶ In January 2008 there were four proceedings based on the VStGB. If they were based on alleged violations of the law of armed conflict cannot be assessed. Two proceedings were dismissed for lack of sufficient factual indications for the allegations. One of these two, the case against Ignace Murwanashyaka et al., was later resumed and is under trial as of today. Additionally the GBA started and finished another proceeding based on allegations of violations of the law of armed conflict (case against Colonel Klein et al.). Rumor has it that the GBA is investigating allegations of the law of armed conflict in Libya.

106 *Ambos, Anwendungsbereich*, supra note 48, at mn. 28, fn 179.

- *Have any senior military or security service personnel or senior government officials ever been investigated or prosecuted for possible LOAC violations, or for being responsible for such violations (e.g. by ordering, approving, tolerating, ignoring or covering up violations)?*

In one case the actions of a major were investigated. Cf. supra [133] et seq.

- *What examples are available concerning investigations or other inquiries of alleged LOAC violations regarding the following types of incidents (please indicate their outcome).*

1. Theft/assault or alleged mistreatment of civilians (not taking a direct part in hostilities);

None.

2. Mistreatment of detainees including during interrogation;

None.

3. Use of force while helping maintain law and order (either directly or in support of police forces) in occupied territories;

None.

4. Use of force while seeking to arrest or detain a civilian taking a direct part in hostilities;

None.

5. Use of force at a checkpoint or during a similar operation;

Cf. supra [144] et seq.

6. Targeting civilians taking a direct part in hostilities;

Case against Colonel Klein, cf. supra [133] et seq.

7. Use of force against a member of an organized armed group or terrorist organization in the context of an armed conflict;

Case against Colonel Klein, cf. supra [133] et seq.

8. Use of force against an enemy which resulted in collateral civilian casualties;

Case against Colonel Klein, cf. supra [133] et seq.

9. Any other relevant case.

None.

- *Is there any other information which you would like to bring to the attention of the Commission?*

In the foreseeable future there will be no military justice system in Germany. There is only the possibility that the Office of the Prosecution in Potsdam will receive a special competency. It may be competent to investigate all alleged offenses by German troops abroad.

APPENDIX VI. ACT TO INTRODUCE THE CODE OF CRIMES AGAINST INTERNATIONAL LAW

Translation by Brian Duffet, revised by Jan Nemitz and Steffen Wirth

The Act to introduce the Code of Crimes against International Law contains the following:

- Article 1: Code of Crimes against International Law
- Article 2: Amendment to the Criminal Code
- Article 3: Amendment to the Code of Criminal Procedure
- Article 4: Amendment to the Courts Constitutions Act
- Article 5: Amendment to the Act Amending the Introductory Act to the Courts Constitution Act
- Article 6: Amendment to the Act on State Security Files of the former German Democratic Republic
- Article 7: Repeal of a continuing provision of the Criminal Code of the German Democratic Republic
- Article 8: Entry into Force

[This legislation is not reproduced in full here, but may be accessed at: <http://www.mpicc.de/shared/data/pdf/vstgbengl.pdf>]

NETHERLANDS: INVESTIGATION AND PROSECUTION OF ALLEGED VIOLATIONS OF THE LAW OF ARMED CONFLICT

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GENERAL

a. Provide a general description of the national system for investigation and prosecution of alleged LOAC violations. In particular, describe whether they are handled within the civilian or military justice systems.

1. The investigation and prosecution of violations of the Law of Armed Conflict (also referred to as LOAC or International Humanitarian Law/ IHL) is primarily the responsibility of the *Landelijk Parket* (National Prosecutorial Authority), which forms part of the *Openbaar Ministerie* (Public Prosecution Service), the State organ responsible for the investigation and prosecution of all criminal offences under Dutch criminal law (Art. 134 of the Law on Organization of the Judiciary). The Public Prosecution Service falls within the Ministry of Justice and Security

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and forms an autonomous prosecutorial organization organized along territorial and functional lines. The *Landelijk Parket* is charged with the investigation and prosecution of certain (inter)national offences, including violations of LOAC. The *Landelijk Parket* is inter alia responsible for the investigation and prosecution of offences under the *Wet Internationale Misdrijven* (officially referred to in English as the International Crimes Act), which was adapted 19 June 2003 and entered into force on 1 October 2003, as national implementation legislation of the Rome Statute of the International Criminal Court. (It should be noted that the *Landelijk Parket* is not exclusively concerned with investigating and prosecuting violations of LOAC or other international offences; its writ extends also to organized national and transboundary crime and to terrorism).

2. The *Landelijk Parket* is assisted by the *Dienst Nationale Recherche* (National Investigation Service), which is the organ of the police in charge of investigating (inter)national offences falling under the *Landelijk Parket*, including offences under the International Crimes Act. Both the *Landelijk Parket* and the *Dienst Nationale Recherche* are part of the civilian justice system. The *Landelijk Parket* is located in Rotterdam and the International Crimes Act designates the District Court in The Hague as the court in first instance for the trial of persons accused under its provisions (Art. 15 International Crimes Act), except with regard to members of the armed forces and other persons who fall under military law (Art. 4 of the Military Justice Administration Act, abbreviated in Dutch as the WMS); see also [52]-[56] below). In addition to these, the Chief Prosecutor of the District Court in Arnhem and the Military Chamber of that court have jurisdiction over offences under military criminal and disciplinary law, which do not fall under the International Crimes Act and the Chief Prosecutor (comparable to a District Attorney) is assisted by the Royal Military Constabulary (*Koninklijke Marechaussee*) who are the Military Police charged with the investigation of all offences under military law.

3. The military justice system in the Netherlands could be described to some extent as a hybrid civilian/military system, with the former element predominant. The *Hoofdofficier van Justitie* (Chief Prosecutor or District Attorney) in Arnhem, his/her staff of Assistant Prosecutors and support staff are all civilians. The Military Chamber of the District Court in Arnhem is formed of three judges, two of whom, including the President, are civilians and one of whom is a military member drawn from the legal service of the branch of the armed forces of whom the accused is a member. (For a fuller description of the military justice system, see [52]-[56] below.) In practice, the investigation of suspected violations of LOAC by members of the armed forces will involve close cooperation between the Chief Prosecutor in Arnhem and the National Prosecutorial Authority in Rotterdam and their respective teams of investigators. If a suspected breach of LOAC were committed by a member of the armed forces on deployment abroad, the offence will normally be initially reported and investigated by the Royal Military Constabulary deployed in the mission area, acting under the instructions and responsibility of the Chief Prosecutor in Arnhem.

b. What acts are considered breaches of the law of armed conflict?

4. All acts designated as grave breaches of the Geneva Conventions of 1949 and their Additional Protocols and all other violations of the laws and customs of war in relation to both international and non-international armed conflicts are designated as felonies under the abovementioned International Crimes Act. (See articles 5, 6 and 7 of said law. Their designation as felonies under Dutch criminal law is provided for in Art. 10 thereof.) Article 5 of the International Crimes Act (Dutch acronym *WIM*) is applicable to all offences designated as grave breaches of the Geneva Conventions of 1949 and its First Additional Protocol of 1977 in the context of an international armed conflict. (See Articles 50 GC I, 51 GC II, 130 GC III, 147 GC IV, and 11 and 85 of AP I.) In addition, a number of other serious violations of the law of armed conflict relating to an international armed

conflict are also made punishable under Article 5 *WIM*. These include such acts as, misuse of the white flag, of the uniforms or insignia of the opposing party, of the United Nations, or of the protected emblems of Geneva, when this results in death or serious injury, attacks upon personnel, vehicles or installations engaged in humanitarian relief efforts and attacks upon peacekeeping personnel, vehicles or installations, as long as these are entitled to protection under the law of armed conflict, the use of civilians or protected persons to shield military objectives from attack, violations of the 1954 Hague Convention on Cultural Property or its protocols, willful attacks upon buildings recognizable as being used for religious, educational, scientific, or charitable purposes or upon historical or cultural monuments, as long as these have not become military objectives, use of poisonous weapons or gasses or other poisonous or suffocating substances, use of expanding bullets or munitions which flatten or widen upon entry into the human body, rape, sexual slavery, forced prostitution or pregnancy, forced sterilization, or other forms of serious sexual assault which would be viewed as a serious violation of the Geneva Conventions or their Additional Protocols.

5. Article 6 *WIM* is applicable to violations of the law of armed conflict relating to non-international armed conflicts, including to violations of Common Article 3 of the Geneva Conventions of 1949, to wit, attacks upon persons who are wounded or are otherwise incapacitated and no longer offering resistance or have surrendered or have indicated a desire to surrender, assaults on the life or physical safety of persons including in particular killing or inflicting serious injury by any means and the inflicting of any form of torture, cruel, humiliating or degrading treatment of persons who have laid down their arms or who are not directly participating in hostilities and the imposition or execution of sentences without prior recourse to a regularly constituted tribunal offering guarantees of judicial due process generally recognized as elementary.

6. Article 6 *WIM* also applies to other serious violations of the law of armed conflict applicable to non- international armed conflicts, including such acts as rape, forced sterilization, sexual slavery, forced pregnancy, or other serious sexual assault, the conducting of medical or scientific experiments upon persons belonging to the opposing party which are not required for medical or dental treatment in the interest of the patient and which result in death or serious injury, perfidy resulting in death or injury, willful attacks on the civilian population or individual civilians not directly participating in hostilities, the taking of hostages, willful attacks upon medical personnel, vehicles or installations enjoying the protection of the emblems of Geneva, willful attacks upon humanitarian relief personnel, vehicles or installations or upon peacekeeping personnel, vehicles, or installations acting under the United Nations Charter who have not lost their protected or civilian status, the plundering of a city, town or village, including after assault and capture, attacks upon buildings recognizable as being used for religious, educational, scientific, or charitable purposes, as historic or cultural monuments or as hospitals, as long as these have not become military objectives, conscription or recruitment of persons under the age of fifteen, or using such persons to actively participate in hostilities, declarations of denial of quarter, the destruction or confiscation of the civilian goods or property of the opposing party, unless urgently required under conditions of overriding military necessity, the transfer or removal of the civilian population, unless urgently required as a means of protecting them from the effects of the conflict or as a measure imperatively required under military necessity.

7. All other breaches of the laws and customs of war not falling under either of the previously mentioned Articles 5 and 6 *WIM*, are punishable under Article 7 *WIM*.

c. What breaches of the laws of armed conflict are considered to be war crimes? Is the source of the designation as a “war crime” found in legislation or case law? Please elaborate.

8. The designation “war crime” is not explicitly used or found in the *WIM* or other legislation as such. The term *ernstige inbreuken* (grave breaches) *schendingen* (violations) or *zich schuldig maakt aan een van de volgende feiten* (is guilty of any of the following acts) is used to denote acts which are punishable as felonies under the *WIM*. It is fair to say that the acts designated under Articles 5 and 6 would qualify as “war crimes” as the term is generally used and appear as such in the Rome Statute, upon which the International Crimes Act (*WIM*) is based. The inclusion in Article 7 *WIM* of the category of “violations of the laws and customs of war other than those designated under Articles 5 and 6”, would probably denote acts which may or may not qualify as “war crimes” as the term is generally used. Depending upon the factual and other relevant circumstances such “other violations” could so qualify, but not always or invariably. For example, simple non-aggravated assault upon a prisoner of war or captured or detained person without (danger of) serious injury or amounting to cruel, humiliating or degrading treatment, or the theft of a personal item from such a person would constitute a violation of the laws and customs of war, but would not qualify as a war crime as the term is generally used, or under the Rome Statute. Such an act would be punishable as a felony under Article 7 *WIM* and/or as an offence under military and general criminal code, if the perpetrator were subject to military jurisdiction. However, it should also be pointed out that some of the violations of the laws and customs of war included under Article 7 could constitute war crimes if they resulted in death, serious injury, if they constituted cruel or degrading treatment, if they were intended to force a person to do or abstain from doing something which he/she would be otherwise legally entitled or required to do, or if it involved plundering of a city, town or village, including after assault and capture.

9. The offences under Articles 5 and 6, which would generally qualify as “war crimes” carry severer penalties under the *WIM* (imprisonment for up to fifteen years for the second category and thirty years to life for the first

category), than the category of “other violations of the laws and customs of war” under Article 7 *WIM*, with the exception of those mentioned above as qualifying as “war crimes”. In the case of such “other violations”, the penalty is set at a maximum of ten years imprisonment, except for those which would generally be qualified as “war crimes” as listed above, in which case the maximum penalty is increased to fifteen years imprisonment. All offences under the *WIM* could, without doubt, be qualified as serious felony offences under Dutch criminal law, in view of the penalties which can be imposed and the nature of the offences.

d. What acts fall within any such legislation or case law?

10. Both acts under Articles 5 and 6 of the *WIM*, which although not explicitly designated as “war crimes” under that law, would generally be qualified as such, and the reference in Article 7 of that law to “other violations of the laws and customs of war” not covered under Articles 5 and 6, have been dealt with extensively in the answers to the previous two questions. The *WIM* also addresses the offences of genocide under Article 3 and crimes against humanity under Article 4 *WIM*. Both of these are defined in substantially the same terms as in the corresponding offences under Articles 6 and 7 of the Rome Statute. In addition, the *WIM* addresses the offences of torture and forced disappearance in Articles 8 and 8a thereof, neither of which is separately addressed in the Rome Statute. The offence of torture is based on the definition used in Article 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which has been currently ratified by 147 States. The offence of forced disappearance is defined in Article 8a *WIM* with reference to Article 4, lit. 2, sub d of the same law as the arrest, holding captive, abduction, or any other manner of deprivation of liberty, by or at the behest of a State or political organization, followed by refusal to divulge the situation and whereabouts of the person or through concealment of the location of the person, whereby the person falls outside the protection

of the law. None of the offences under Articles 3, 4, 8 or 8a *WIM* require a nexus with an armed conflict, and as such, do not need further elaboration for the purposes of answering this enquiry.

e. If breaches of the laws of armed conflict do not amount to war crimes, how are they dealt with?

11. As stated in the answer to the penultimate question, “other violations of the laws and customs of war” are addressed in Article 7 *WIM* and these either could constitute “war crimes” as the term is generally used and which are designated as such under the Rome Statute, or offences against the laws and customs of war, not qualifying as war crimes. Certain such offences, such as simple assault or theft, could in some cases be prosecuted as crimes under either military or general criminal law. See [4]-[9], [43]-[44] for further elaboration.

f. Is your country Party to the International Criminal Court statute? If so, how does that influence the national system of investigation and prosecution regarding alleged LOAC violations?

12. The Netherlands played a significant role in the negotiations leading to the adoption of the Rome Statute of the ICC. It signed the Rome Statute on 18 July 1998 and deposited its ratification on 17 July 2001. The seat of the Court is in The Hague. The adoption of the International Crimes Act (*WIM*) was a direct result of the Netherlands becoming a party to the Rome Statute. Prior to its adoption of the *WIM*, it was not altogether clear whether the Netherlands had sufficient legislation in force to prosecute violations of the law of armed conflict, unless the Netherlands was a party to said conflict or a Netherlands citizen was either a perpetrator or victim of a violation committed in the context of an armed conflict to which the Netherlands was not a party. Moreover, prior to the establishment of the National Prosecutorial Authority (*Landelijk Parket*), which has jurisdiction

over, *inter alia*, offences under the *WIM*, there was no adequate mechanism in place for the investigation and prosecution of violations of the law of armed conflict, especially those committed in the context of a conflict to which the Netherlands was not party.

g. Does your country treat human rights law as applicable in armed conflict? If so, on what basis and to what extent?

13. The Netherlands considers human rights law as *de jure* applicable in armed conflict whenever an act falls within the jurisdiction of a particular human rights convention to which the Netherlands is a party and to the extent the applicability has not been derogated from in accordance with the provisions of the relevant human rights convention. The Netherlands is party to all major human rights treaties, both of a worldwide and a regional character. These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the abovementioned International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the European Convention on Human Rights (ECHR), to name the most relevant in this context.

14. With regard to the ECHR, it has been established through case law (see below for elaboration) that the Convention is applicable not only within the territory of a State party to the convention (aside from possible valid derogations), but also in cases where effective territorial control is exercised by a State party to the Convention, or whenever a person is in the custody of or under the effective physical control of State agents of a State party to the Convention, even if this occurs outside the territorial confines of a State party to the Convention. Outside these two situations (territorial control or physical custody or effective physical control over individuals) in which jurisdiction is exercised outside the territory of a State party to the Convention, the case law of the European Court of Human Rights (see

below for elaboration) has determined that the Convention is not applicable in principle. Therefore the conduct of hostilities (e.g. aerial bombardment) which occurred outside of the territory of a State party to the Convention, would not in principle fall within the scope of the Convention as a matter of law. Any act which were to occur on the territory of a State which was party to the Convention, would fall within the jurisdictional scope of the Convention, but in the case of a valid derogation having been made in accordance with Article 15 of the ECHR, the act would be governed by the law of armed conflict and provided it qualified as “a lawful act of war” (Art. 15, lit 2) and/or was not otherwise inconsistent with other obligations under international law (including the LOAC), would not be in violation of the Convention.

15. However, in addition to the situations in which the Convention is formally applicable, the Netherlands applies the provisions of the ECHR as a matter of policy in all situations where Netherlands armed forces are deployed on a mission abroad, including situations where the Convention is not *de jure* applicable, because of lack of effective jurisdiction under Article 1 of the Convention.

16. In sum, the Netherlands considers human rights law to be *de jure* applicable within the territorial scope of the ECHR and/or other relevant human rights treaty, and extraterritorially in situations where the Netherlands exercises, either effective territorial control, or a person is in the custody or effective physical control of a State agent of the Netherlands, including a member of the armed forces and applies it as a matter of policy in all cases of extraterritorial deployment, irrespective of whether or not it is formally applicable. See also [79]-[80] below for elaboration regarding this policy.

h. Is your country subject to national/regional human rights tribunals or other fora which could investigate alleged LOAC violations (e.g., European

Court of Human Rights)? If so, please briefly describe any key cases in that regard.

17. The Netherlands is subject to the jurisdiction of the European Court of Human Rights (ECtHR) and a number of other quasi-judicial procedures set up under the provisions of other (UN) human rights conventions, including the UN Human Rights Committee. Only the first named forum will be extensively addressed here. The European Court of Human Rights has a fairly extensive jurisprudence regarding the application of the Convention in situations of armed conflict and national emergency and there is considerable academic literature regarding this case law. In the interest of clarity and brevity only a few of the most important cases will receive attention here alongside some additional references.

18. With regard to the extraterritorial application of the European Convention, the applicability of the Convention in situations where a State party to the ECHR exercises effective territorial control as a result of military occupation or similar territorial control was addressed in the *Loizidou v Turkey* decision of the ECtHR (Judgment of 23 March 1995, Preliminary Objections 20 EHRR 99), where the Court determined that the Convention applied “when as a consequence of military action- whether lawful or unlawful- (a State party) exercises effective control of an area outside its national territory”. In the *Issa and Others v Turkey* case (Application no 31812/96, Judgment of 16 November 2004, para.71), and in the **Öcalan v Turkey** case (Application no.46221/99, Judgment of 12 May 2005, para.91) the ECtHR determined that the Convention was applicable when a person is “under the former State’s (i.e. a State party to the ECHR) authority and control through its agents operating- whether lawfully or unlawfully- in the latter State” (i.e. on the territory of a State which is not party to the ECHR). In its decision in the *Bankovic v Belgium et al.* case (Application no. 52207/99, Judgment of 12 December 2001, paras. 75-80), the ECtHR determined that extraterritorial application of the Convention

is exceptional and did not apply to aerial bombardment of targets located outside the territorial scope of the Convention.

19. This reasoning would probably apply by analogy to the extraterritorial conduct of hostilities in a more general sense between the armed forces of a State party to the Convention and those of a State not party to the Convention, or in relation to an organized armed group located outside the territorial scope of the Convention, in so far as this did not extend to the control of territory or physical control or custody over individuals in the power of State agents to a party to the Convention. As to hostilities or other measures conducted or undertaken within the territorial scope of the Convention, the Convention would fully apply, except to the extent there was a valid derogation under Article 15 of the Convention. This would include an armed conflict of a non-international character, as is made clear by the ECtHR judgment in the *Isayeva et al. v Russia* case (Application no.57947/00, Judgment of 24 February 2005), where the Court applied human rights standards relating to necessity and proportionality in the use of force to the internal armed conflict in Chechnya (para. 182) without specific reference to the LOAC, due to the fact that the Russian Government had not entered a derogation under Article 15 of the Convention (para. 125). It may well be that the Court would have reached a similar conclusion of unlawfulness in the event a derogation had been entered and it had taken the LOAC standards regarding precautions in attack and proportionality *in bello* into account, but that is not relevant to the question of the full applicability of the Convention in the absence of a derogation, which is under discussion here.

20. Another situation in which the application of the Convention could be precluded is in the event a military operation were undertaken within the territorial scope of the Convention under a mandate of the United Nations Security Council and under the overall command and control of the United Nations. This issue arose in the *Behrami v France* decision of the ECtHR

(Application no.71412/01, Admissibility Decision of 31 May 2007, 45 EHRR SE10.) In that decision, the ECtHR determined that actions and omissions of States Party to the Convention were not within the Court's jurisdiction, due to the fact that the operation was carried out under United Nations Security Council mandate and under its overall control. Although that decision does not say that the obligations under the Convention cease to be operative, it would appear that the Court takes the position that it cannot assume jurisdiction in such situations and that the obligations of the States Party to the Convention which are operating under overall UN control and authority are overridden by their obligations to give precedence to the UN Charter under Article.103 thereof, notwithstanding a considerable amount of controversy that this decision has caused in academic literature due to the lack of effective remedy. (See e.g. D. Fleck, "Status of Forces in Enforcement and Peace Enforcement Operations" in T.D. Gill & D. Fleck (eds), *The Handbook of the International Law of Military Operations*, Oxford, Oxford University Press (2010), 94 at 109.)

21. In sum, the case law of the European Court of Human Rights makes clear that the ECHR is applicable to situations of armed conflict within the territorial scope of the Convention, except where valid derogations may have been made and an act is lawful under the international law of armed conflict or other relevant international legal obligations. In addition, the Convention applies to extraterritorial military operations to the extent there is effective control over territory or individuals to establish jurisdiction under Article 1 of the Convention. This position is also mirrored in the decisions of quasi judicial bodies exercising oversight with respect to the UN Human Rights Covenants. (See HRC, General Comment no.31: Nature of the General Legal Obligations on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) at 10) and in the case law of the International Court of Justice (*Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *ICJ. Reports 2004*, 1009, paras. 111-112.) It should be pointed out,

that this position, while generally accepted by most States, including the Netherlands, is not universally supported by all States, including the United States and the State of Israel.

i. What other options are available for investigating possible LOAC violations (e.g., public inquiries, parliamentary hearings, special prosecutors)?

22. Under the Constitution of the Kingdom of the Netherlands (*Grondwet van het Koninkrijk der Nederlanden*, abbreviated as *GW* in Dutch), the Members of the Cabinet are required to provide information and respond to questions, orally and in writing put to them by Members of Parliament (Art.68 *GW*) and both chambers of Parliament have the right to initiate a Parliamentary Inquiry (Art.70 *GW*), which could include an inquiry into situations involving potential LOAC violations, or other questions related to the conduct of a military operation or incident within the context of a military operation in which the armed forces of the Netherlands were participating or had participated. In addition, the Government could, on its own initiative, or at the inducement or request of Parliament, initiate an independent inquiry or investigation into situations involving potential LOAC violations, or other matters relating to a particular military operation or aspect of a military operation in which the Netherlands was participating or had participated. In the event there were reasonable suspicion of criminal conduct giving rise to a criminal investigation, such inquiries would refrain from addressing questions relating to criminal conduct, or would be suspended. Both the Government and the Parliament through parliamentary motions, could take measures, make suggestions or lay down requirements to ensure that the inquiry was conducted in an independent and impartial manner.

23. Examples of both an independent report conducted at the request of the Government (with Parliamentary approval) and of a Parliamentary Inquiry can be seen in relation to the circumstances leading up to

and surrounding the fall of Srebrenica in July 1995. As a result, the Government initiated (with parliamentary approval) an investigation by the Netherlands Institute of War Documentation (Dutch abbreviation *NIOD*) into the background and circumstances of the fall of the enclave and the ensuing genocide, including the role of the Netherlands contingent (DUTCHBAT) of the UN Peacekeeping Force UNPROFOR in the incident. The *NIOD* produced an extensive report presented in April 2002, which subsequently (indirectly) led to the fall of the Government, when a number of members assumed political responsibility for the incident and chose to resign. Following the resignation of the Government, the lower chamber of Parliament initiated a parliamentary enquiry which conducted public hearings and questioned witnesses in November-December 2002 and presented its final report in January 2003. Subsequent to the official reports and investigations, a number of non-governmental and political lobby groups also conducted an investigation and civil proceedings were initiated by a group of Bosnian family members of the victims at Srebrenica (referred to generally as the “Mothers of Srebrenica”) against the State of the Netherlands and the United Nations before the District Court in The Hague. In a decision of 30 March 2010, the Appeals Court in The Hague upheld an earlier decision of the Hague District Court that the UN was immune to proceeding before Dutch courts and accepted that the Netherlands was a joint party alongside the United Nations. (See e.g. B. Kondoch, “The Responsibility of Peacekeepers, Their Sending States, and International Organizations” in T.D. Gill & D. Fleck (eds.) *The Handbook of the International Law of Military Operations*, Oxford, Oxford University Press (2010), 515, at 516, n.6).

24. The abovementioned example gives a fair summary of the options available under Dutch law in relation to parliamentary inquiries, independent investigations and civil proceedings in relation to alleged LOAC or other relevant international law violations. There are no provisions under Dutch law for the installation of “special prosecutors”.

j. *What is the basis for criminal jurisdiction over breaches of the laws of armed conflict in your country (territoriality, nationality, passive personality, protective)?*

25. The International Crimes Act utilizes a combination of concurrent sources of jurisdiction. These include territoriality, nationality (both active and passive; i.e. if either the suspected perpetrator is or subsequently becomes a Netherlands national, or the victim of the suspected violation is a Netherlands national) and qualified universality; jurisdiction can be established irrespective of where the suspected offence occurred or the nationality of the suspected perpetrator(s) or victim(s), provided the suspected perpetrator(s) are present on Dutch territory or the territory of certain associated territories in the Netherlands Antilles. These bases of jurisdiction are dealt with in Article 2 of the *WIM*, in conjunction with the Law on General Provisions of Criminal Jurisdiction (*Wet Algemene Bepalingen*) and the Military Criminal Code (*Wetboek van Militair Strafrecht*). The exercise of criminal jurisdiction is precluded in the event a suspected person is a foreign head of State or government in office, a serving Minister of Foreign Affairs, or is otherwise entitled to immunity under treaties to which the Netherlands is a party or under customary international law (Article 16 *WIM*).

k. *Does the national war crimes legislation jurisdiction extend to members of the military? If so, under what circumstances?*

26. Yes, members of the Netherlands armed forces are subject to all criminal legislation in force in the Netherlands extending to common, military and international offences and on deployment abroad on the bases of the nationality and “flag State” principles.

l. *Is there universal jurisdiction and how is such jurisdiction exercised?*

27. Yes, see [25] above.

m. Does your country deal with the issue of “command responsibility”? If so, how?

28. Article 9 of the International Crimes Act denotes two categories of what is often referred to as “command responsibility”. Firstly, a superior, whether military or civilian, who exercises command authority over one or more subordinates and who willfully allows or encourages, or willfully ignores or fails to take measures required and within his/her power to prevent or bring to the attention of the competent authorities any offence under the *WIM* is treated in effect as a co-perpetrator and is subject to the same punishment as the person or persons who committed the offence. Secondly “command responsibility, *strictu sensu*, whereby a military or civilian commander or superior fails through culpable negligence to take the necessary measures which can be reasonably expected from him/her to prevent or bring the offence to the attention of the competent authorities is punishable for such negligence with a maximum of two thirds of the primary sentence applicable to the offenders.

n. Does your country deal with the “defence of superior orders”? If so, how?

29. Article 11, paragraphs 2 and 3 *WIM* address the possibility of a defense on the basis of superior orders. The subordinate who commits an offence which he/she considers in good faith to be a lawful and competent order issued by a person to whom he/she is in a subordinate relationship will not be punished, provided the order did not concern an offence qualifying as (part of) the offences of genocide, crimes against humanity, or forced disappearance, in which case no good faith presumption as to the lawfulness of the order will be recognized.

CIVILIAN JUSTICE SYSTEM

a. *What is the structure of the civilian system of justice and the role of civilian courts, Attorney General/or similar prosecution authority and civilian police both in general, and specifically regarding the investigation and prosecution of alleged LOAC violations?*

30. The (civilian) justice system in the Netherlands consists of two branches, the courts and the Public Prosecution Service (*Openbaar Ministerie*, Dutch acronym *OM*). The courts are divided and organized hierarchically and territorially as follows: There are 19 District Courts spread across the country which are competent in first instance in all criminal matters involving felony offences. Misdemeanor offences, along with civil cases involving claims of less than 5000 euros, are handled by the 61 *kantongerechten*, (which are separate sections within the District Courts and which are roughly comparable to a justice of the peace; these will not receive further attention here. One District Court (Arnhem) has a military chamber, which is competent in relation to (suspected) criminal offences by members of the armed forces committed either in the Netherlands, or abroad and which is dealt with elsewhere in this questionnaire. Each District Court has a President and a varying number of Vice Presidents and judges (depending on the size of the court) and supporting staff. There are 5 Courts of Appeal, which hear cases on appeal by either the *OM* or the defense. In appeal cases before one of these courts, the entire case is usually heard again in full and the Appeals Courts are free to either uphold, or totally or partially overturn a previous decision by a District Court and impose a higher or lower sentence in case of a conviction. The Courts of Appeal also have competence in cases where a complaint is entered against a decision by the Public Prosecution Service to not bring a suspected offence to trial. In the event the complaint is upheld, the Prosecution Service must pursue the investigation and bring the matter to trial. In cases where one of the parties in an appeals case is of the opinion that the decision of the

Court of Appeals has made an error in interpreting or applying the law, an appeal in cassation (*cassatieberoep* in Dutch) can be made to the Supreme Court (*Hoge Raad*) in The Hague. The Supreme Court only addresses questions of law, it has no competence to review facts. If it finds a mistake in law has been made, it will quash the decision of the Court of Appeals on that point or those points of law, which have found to have been in error and return the case to usually another or possibly the same Court of Appeals to be heard again, taking into account the correct interpretation of the legal question(s) that the Supreme Court has found to have been in error. In exceptional cases, the Supreme Court makes the final decision.

31. The criminal justice system in the Netherlands follows the continental civil legal tradition and is usually classified as “mildly inquisitorial” (*gematigd inquisitoor*) in nature by legal scholars (as opposed to the accusatorial system in force in countries following the common law tradition). All trials for serious felony offences are by a panel of three judges, both in first instance and on appeal. Minor offences are tried before a single judge. There is no trial by jury in the Netherlands.

32. The other branch of the criminal justice system is the Public Prosecution Service (*Openbaar Ministerie* or *OM*) referred to above. It is organized along territorial and functional lines and has exclusive authority to prosecute offences under both civilian and military criminal law (the members of the *OM* are all civilians). It is an autonomous national organization within the Ministry of Justice and Security and has a significant degree of discretion to independently determine whether a suspected offence should be brought to trial or not (see above in relation to the power of Courts of Appeal to order prosecution.) Together with the courts it forms part of the judiciary. The *OM*, as it is generally referred to, has 19 regional (*arrondissements parketten*) or District Prosecutors (which are currently being partly fused into 10 districts), corresponding to the 19 District Courts referred to in the previous paragraph, 5 interregional agencies (*Landelijke Ressortelijke Organisatie*)

corresponding to the jurisdictional areas falling under the 5 Courts of Appeal and a number of national branches, including the “Functional Prosecutorial Authority” (*Functioneel Parket*) in charge of investigating and prosecuting environmental and economic offences and the National Prosecutorial Authority (*Landelijk Parket*), which is *inter alia* in charge of investigating and prosecuting certain (inter) national offences of a serious character, including international crimes under the International Crimes Act (*WIM*) referred to previously and which has been addressed at length in the previous section of this questionnaire. (See [1]-[2] above).

33. The police in the Netherlands are a civilian organization (with the exception of the Royal Military Constabulary) which falls under the Ministry of Security and Justice in all matters relating to the investigation of criminal offences. They act under the general instruction and overall direction of the Public Prosecution Service in relation to matters involving criminal investigation, specifically under the direction of the relevant district, interregional or national prosecutorial authority which is competent in a particular region or with respect to a particular category of offence. The National Investigation Service (*Nationale Recherche*) which is part of the National Police Corps (*Korps Landelijke Politiediensten*) falls under the National Prosecutorial Authority and includes a special team of investigators and advisors (*Team Internationale Misdrijven*) whose task is investigation of suspected offences of an international character, including offences under the International Crimes Act. (For further information, see [1]-[2] above.)

b. If there is an Attorney General or similar individual in your country, what is his or her role, in particular with regard to incidents in which there might be a possible LOAC issues or a possible LOAC violation? Advice on legal matters? Supervision over subordinate prosecutors? Supervision over investigative or police personnel? Authority to determine whether to charge? Any other relevant authority?

34. The general consistency, quality and coherence of prosecutorial policy is in the hands of the “College of Procurers General” (*College van procureurs-generaal*) which can be described a collegiate body of between 3 and 5 senior prosecutorial magistrates with powers roughly equivalent to those of an Attorney General in some other legal systems, although this term is also used in, for example, the United States to denote a cabinet level function of a more political nature which would correspond to the Minister of Justice and Security in the Dutch legal system. The *College van procureurs-generaal* lays down general guidelines for prosecutorial policy and can issue instructions and general directives to subordinate District (Chief) Prosecutors in matters of prosecutorial policy, including suspected violations of the Law of Armed Conflict, although subordinate prosecutors have a large degree of autonomy in day to day operational questions. The *College van procureurs-generaal*, however, can intervene in matters of national importance and ensure that a suspected violation is investigated and brought to trial if they were of the opinion that the responsible prosecutor was not sufficiently diligent in pursuing the matter (Art. 130, lit. 4 Law on Organization of the Judiciary (*Wet op de Rechterlijke Organisatie*)).

c. Do the civilian investigative authorities, including criminal investigators, act independently or are they subject to the direction of the prosecutor or other actors in the justice system?

35. The police, both civilian and military, act under the general guidance and direction of the Public Prosecution Service in matters pertaining to the investigation of criminal offences. They have, however, the authority to intervene in a situation where a criminal offence is in progress, or where they have reasonable grounds to suspect a criminal offence has been committed, including a suspected violation of the law of armed conflict. In the event they act on the basis of reasonable suspicion, the criminal offence must be of a certain gravity if a person is to be detained, i.e. one for which provisional

custody (*voorlopige hechtenis*) is provided for by law (all violations of the abovementioned International Crimes Act do so qualify), and in such cases, the suspect must be informed of the reasons for his detainment and brought before an examining magistrate within as short a period as possible, but in any case, not exceeding 87 hours. During questioning by the police, the suspect must be cautioned and is not required to answer questions put to him/her and to be assisted by counsel if he/she so chooses. Once a suspect has been brought before an examining magistrate (known as a *rechter commissaris* in Dutch), it will be determined whether further investigation is required, and if so, whether the suspect must remain in custody in the interest of the investigation. During the hearing before an examining magistrate, the suspect has a right to be represented by counsel and, if necessary, an interpreter must be present if the suspect is not capable of communicating in the Dutch language. Once it has been determined that there are sufficient grounds for continuing an investigation, the direction thereof is in the hands of the Public Prosecution Service. In situations where members of the armed forces are deployed abroad and there is no examining magistrate readily available, the procedure is somewhat different as is set out below in [45]-[50].

36. The Public Prosecution Service is an autonomous and independent body within the Ministry of Justice and Security, acting under the general direction of the policy guidelines laid down by the abovementioned *College van procureurs-generaal* and within the parameters of previous court decisions (including the ECtHR) and forms part of the judiciary. It has a significant degree of discretion in determining whether a matter requires investigation and whether or not to bring a matter to trial. If it chooses not to proceed to trial, for example, because it does not find sufficient evidence of a criminal offence, a complaint can be brought before the competent Court of Appeals, which has the power to order that further investigation is required and that a matter must be brought to trial. (See above [30]-[33] and below [37].)

d. What, if any, safeguards are in place (under law, regulation, policy or practice) regarding the independence and impartiality of the various actors in the civilian justice system that might be involved in investigating and/or prosecuting possible LOAC violations? Is there any relevant case law?

37. The criminal investigation of all offences, including suspected violations of the LOAC and other international crimes, is exclusively in the hands of the Public Prosecution Service and is completely separate from any investigation which a service commander or the Ministry of Defence might (not) undertake regarding a particular operation or incident. The role and organization of the Public Prosecution Service has been set out in answers to previous questions in this questionnaire. In the event a decision by the Public Prosecution Service to not pursue an investigation or bring a matter to trial is contested, it can be brought before a Court of Appeals, which can determine whether investigation and/or trial are warranted. This has also been dealt with in previous answers to questions above. See also [81] below.

e. If a matter is subject to both a public inquiry and a criminal investigation how does it proceed (criminal first/concurrent investigation, etc.)?

38. There are no formal provisions of law laying down in which sequence a public inquiry and a criminal investigation would be undertaken if they were to be applied concurrently to the same situation. In practice, a public or parliamentary inquiry would be more concerned with the general factual background and factual situation in relation to a particular incident or situation, than with establishing criminal responsibility of any particular individual or group of individuals, while a criminal investigation would be more focused on the latter. If a public or parliamentary inquiry disclosed information which could indicate criminal responsibility, the Public Prosecution Service (*Openbaar Ministerie/OM*) would proceed to initiate a

criminal investigation to ascertain whether there were sufficient grounds to bring a matter to trial. In principle, a public inquiry would abstain from making pronouncements concerning the guilt or innocence of any individual or group of individuals, in particular if the matter was under criminal investigation, or *sub judice*.

f. Are there specific laws applicable to members of civilian security services? If so, please briefly describe.

39. The civilian and military intelligence and security services are regulated by the Law on the Intelligence and Security Services (*Wet op de Inlichtingen en Veiligheidsdiensten*, Dutch acronym WiV) of 2002. There are two intelligence and security agencies in the Netherlands, one civilian and the other military. The General Intelligence and Security Service (*Algemene Inlichtingen en Veiligheidsdienst*, Dutch acronym AIVD), is the civilian intelligence and security service in the Netherlands, charged with assessing threats to national security of either a domestic or international nature, undertaking surveillance and gathering information concerning such threats, and making assessments and recommendations to the responsible members in the Government concerning such threats and the possible responses to them. It operates under the direct authority of the Minister of the Interior and Kingdom Affairs and under the coordination of the National Coordinator for Intelligence and Security, who is subject to the authority of the Prime Minister. It has certain powers to conduct surveillance, including electronic surveillance, to observe and follow particular individuals suspected of posing a threat, of entering premises and seizing materials and to collect and store data relating to persons or organizations considered as a threat to national security. Neither it, nor its military counterpart have police or criminal investigative powers and are not authorized to arrest or detain any individual suspected of criminal or otherwise security sensitive conduct. Any police or criminal investigative powers must be exercised by the competent police or investigative agency

possessing police powers in relation to the relevant person(s) or activities and the intelligence services must coordinate and cooperate with the competent criminal investigative and prosecutorial agencies under the authority of the latter, in order to arrest, detain, or otherwise exercise police powers (Art. 9, *juncto* Arts. 60 and 61 *WiV*).

40. The Military Intelligence and Security Service (*Militaire Inlichtingen en Veiligheidsdienst*, Dutch acronym *MIVD*) has similar powers (and limitations thereto) relating to members of the armed forces and security matters which directly affect the armed forces.

41. Neither agency is primarily focused on the investigation of suspected violations nor persons suspected of violating the Law of Armed Conflict, whether Netherlands or foreign nationals. That is the responsibility of the competent investigative and prosecutorial agencies and authorities referred to in previous answers to questions above.

42. With regard to the possible investigation and prosecution of suspected violations of LOAC by members of the intelligence services, it should be pointed out that they are subject to the same regimes of investigation and prosecution as any other civilian or member of the armed forces who is not a member of the intelligence services. Hence, the AIVD is a civilian agency and its members are subject to the same investigation and prosecution regime as any other civilian. In the event a member of this agency were suspected of a breach of LOAC the procedures set out in [1]-[3] above would be relevant. The members of the MIVD are members of the armed forces and are subject to the military justice system and system of investigation and prosecution as set out elsewhere in this report.

MILITARY JUSTICE SYSTEM

a. What breaches of LOAC fall under military law?

43. In the Military Criminal Code (*Wetboek van Militair Strafrecht* (Dutch acronym *MSr*), there are no separate provisions addressing violations of the LOAC. Members of the armed forces are subject to the same criminal provisions which deal with violations of the LOAC as civilians. These are contained in the International Crimes Act (*Wet Internationale Misdrijven*, Dutch acronym *WIM*.) See above [4]-[7].

44. The Military Criminal Code (MSr) has the status of a formal law under Dutch law and includes, along with the Military Disciplinary Justice Act (WMT), a whole range of typical military offences of both a more and less serious nature such as insubordination, absence without leave, dereliction of duty, failure to carry out a lawful direct order, abandoning one's post, destruction of military property etc. Offences under the MSr are criminal offences for those subject to military jurisdiction under Dutch law. Offences under the Military Disciplinary Justice Act (WMT) are less serious disciplinary infractions and do not constitute criminal offences under Dutch law. The MSr (and WMT) complement, but do not replace the regular Criminal Code for persons who are subject to them. Members of the armed forces are consequently subject to both the regular criminal code and the MSr and WMT. The MSr contains offences which are specific to the armed forces and are not covered under the regular criminal code (there are no corresponding offences under the regular criminal code for the type of offences regulated under the MSr, such as disobeying an order). The regular criminal code contains the types of offences against persons and property (assault, homicide, theft etc) which are criminalized in most countries. The regular criminal code also contains crimes against the legal order (e.g. attempting to forcibly interfere with or overthrow the government) and certain international offences (e.g. aircraft hijacking, piracy) and is

supplemented by specific legislation such as the International Crimes Act. Members of the armed forces are subject to all of these. Depending on the nature and seriousness of the offence and the relevant circumstances, the National Prosecutorial Authority could bring charges under any of these. For example, an assault or theft committed against a prisoner of war or detainee by a member of the armed forces could be prosecuted as a crime under the regular criminal code, as a breach of military criminal law (e.g. disobeying an order or service regulation or unruly behaviour) or, in more serious cases where death or serious injury resulted, or as result of an unlawful order by a superior to mistreat detainees as a breach of the LOAC under the International Crimes Act. The discretion as to how to proceed rests with the District Prosecutor for Arnhem, acting under the overall supervision and direction of the *College van procureurs generaal* (see [34] above).

b. What options are available under military law for the investigation of possible LOAC violations (e.g., criminal investigations, boards of inquiry, operational command or unit level investigations)?

45. The *MSr* does not contain a separate regime for the investigation of possible violations of the LOAC. Such investigations are conducted within the regime which applies to the investigation of all criminal offences within the civilian justice system under the Code of Criminal Procedure (*Wetboek van Strafvordering*, Dutch acronym *WvSv*). See [1]-[3] above, [52]-[56] below.

46. To the extent there are no grounds for suspecting the commission of a criminal offence, a commander can initiate an internal investigation into any incident. Should such internal investigation give rise to suspicion that a criminal offence may have occurred, the commander is required to make an official report without delay (Art.78, lit 1 Military Disciplinary Justice Act/*Wet Militair Tuchtrect (WMT)*) to the Royal Military Constabulary

(*Koninklijke Marechaussee*, Dutch acronym *KMar*.) From that moment, the internal investigation by the commander must be terminated.

47. Under certain circumstances, commanders can exercise the powers of investigation which are allocated to adjunct assistant prosecutors (*hulpofficieren van justitie*) or to police officers under the Code of Criminal Procedure *WvSv*.) This is only possible when the unit in question is outside of the territory or in the territorial sea of the Kingdom of the Netherlands and when there is no *hulpofficier van justitie* present or readily available (Art. 59, lit 1 and 2 Military Justice Administration Act/ *Wet Militair Strafrechtspreek (WMS)*). In practice, the policy is to ensure that whenever a unit of any size is deployed abroad that there are one or more *hulpofficieren van justitie* present or readily available.

48. The Royal Military Constabulary (*KMar*) can, in consultation with the Public Prosecution Service, initiate either a criminal investigation or a factual investigation into any situation or incident. The former will be initiated in any case where there are indications that a criminal offence has been committed. Such criminal investigation is subject to the legal regime contained in the Code of Criminal Procedure (*WvSv*) and the Military Criminal Code (*MSr*) and will be conducted in consultation with and under the general supervision of the Public Prosecution Service.

49. If there are no grounds for suspecting that a criminal offence has been committed, but there is nevertheless a need to obtain a fuller factual picture regarding an incident, a factual investigation will be conducted by the *KMar*. The instrument of a factual investigation is not regulated in law, but is rather a matter of policy and standard procedure on the part of the Public Prosecution Service. To ensure a complete answer, this policy can be summarized as follows. The *College van procureurs- generaal* (referred to and set out in [34] above) has set out as general policy that members of the armed forces must have the presumption that they will not be subject

to criminal investigation, as long as they operate within the limits of their authority and in conformity with the applicable rules and procedures laid down for their mission.

50. Nevertheless, every use of force must be reported and accounted for. In this context, a reporting procedure has been developed which requires that after any use of force has occurred, an “After Action Report” is submitted by the commander on location. This report forms part of the operational information provided to the Commander of the Armed Forces (*Commandant der Strijdkrachten/CDS*), but also serves to ensure legal oversight and accountability for any use of force or contact incident. A copy of the report is made available to the Public Prosecution Service by the commander of the *KMar* detachment accompanying the mission. The Public Prosecution Service determines on the basis of this report as soon as possible whether further factual or criminal investigation is called for.

c. Can civilians be the subject of such investigations?

51. In principle, the Military Chamber of the District Court of Arnhem only exercises jurisdiction over members of the Netherlands armed forces. However, in time of war, the military chamber of the Arnhem Court has authority to exercise jurisdiction over certain categories of civilians (Art.2, lit.2 WMS). See for further information [58]-[59] below.

d. Provide a general description of the structure of the military justice system and the role of military courts, prosecution authority (including any military AG/JAG or similar authority) and military police regarding the investigation and prosecution of breaches of the laws of armed conflict?

52. In 1991, the military justice system was integrated into the civilian criminal justice system. As a consequence, all military courts were abolished, along with the previously existing military criminal investigation and court

martial procedure. Under the integrated system in force since 1991, the Military Chamber of the District Court in Arnhem has exclusive authority over offences committed by members of the armed forces (Art. 3, lit.2 WMS). The one exception to this is when a suspected offence occurs within the area subject to the Commander of the Caribbean Area. In that case, the matter is subject to a District Court in the Antilles (part of the Kingdom of the Netherlands, previously known as the Netherlands Antilles). In the event a criminal offence is committed by more than one person, one or more of whom are civilians, any suspected participant who is a member of the armed forces will be tried together with the civilian suspects before the same court, excluding the Military Chamber in Arnhem. This is because of the need to bring all suspects in a single case before the same court and because it is not considered appropriate to subject civilians to a court exercising military jurisdiction, except in exceptional situations in wartime.

53. The Military Chamber in Arnhem consists of three members, two of whom, including the president of the chamber, are civilians. The third member is a member of the armed forces, normally a member of the legal service of the armed forces, preferably from the same branch of the armed forces as the military suspect. For minor offences conducted before a single judge (*kantonrechter/ politierechter*), the judge is a civilian. A decision of the Military Chamber can be appealed by either the accused or the Public Prosecutor and will then be brought before the Military Chamber of the Arnhem Court of Appeals (Art. 60 and 68, lit.1 Law on the Organization of the Judiciary/*Wet op de Rechterlijke Organisatie (Wet RO)* and Art 8, lit.2 WMS). The Military Chamber of the Court of Appeals also consists of two civilian judges (including the president of the chamber) and one military judge. Finally, appeal in cassation (*cassatieberoep*) can be brought before the Supreme Court (*Hoge Raad*) on a disputed point of law. The Supreme Court does not have a military chamber. For further information concerning the civilian justice system, see [30]-[33] above.

54. Prior to 1991, the armed forces had an important role in the investigation and prosecution of suspected criminal offences. However, in 1991, the Legislature decided to allocate these powers to the Public Prosecution Service (*Openbaar Ministerie/OM*), which is, as stated previously, a civilian organization forming part of the Ministry of Justice and Security. Within the *OM*, the investigation and prosecution of criminal offences is allocated to the Military Affairs Section of the District Prosecutor for the District of Arnhem. This Section consists of civilian prosecutors and supporting staff, a liaison officer from the Royal Military Constabulary (*KMar*) and two liaison officers from the military legal service of the armed forces. In addition, the Section also has the advisory services of an Expertise Centre for Military Criminal Law, which is a civilian agency providing the prosecutors with independent legal advice on military legal matters. In appeals cases, investigation and prosecution is handled by the Advocate General (*advocaat-generaal*), which is the title and rank in the Dutch criminal justice system for the Prosecutor at the level of an Appeals Court) for the interregional Appeals District (*Ressortparket*) in Arnhem. The Advocate General and his staff are all civilian officials within the Public Prosecution Service. Both the District Prosecutor and the Advocate General handle regular civilian cases alongside cases involving members of the armed forces, but they have received specialized training and instruction in the handling of military cases.

55. At the highest level of the Public Prosecution Service, the portfolio for military affairs is in the hands of the Chairman of the *College van procureurs-generaal*. The police in cases involving members of the armed forces are the aforementioned Royal Military Constabulary (*KMar*), who act under the authority and general direction of the District Prosecutor (Military Affairs) for Arnhem. They have competence to investigate all criminal offences committed by members of the armed forces. If one or more of its members were suspected of a criminal offence including a violation of LOAC, this would be subject to investigation by the Internal Affairs Section of the *KMar*,

working in conjunction with the National Police Internal Investigation Department (*Rijksrecherche*), which is a civilian agency working under the direction of the National Prosecutorial Authority.

56. Although the armed forces have no authority in the investigation and prosecution of criminal offences since 1991, this does not signify that they cannot act in an advisory capacity. Without prejudice to the independent role of the Public Prosecution Service, the Legislature has determined that when there is reason for the military authorities to believe that the interests of the armed forces have not received sufficient attention in the context of a criminal investigation by the Public Prosecution Service, they can offer advice. In the same context, the law allows the Ministry of Defence to provide advice on matters relating to prosecutorial policy (See Parliamentary Proceedings, Second Chamber, Session 1982-83, 17804 (R1228), no.5, p.41 including.n.16). In practice, there are various forms of consultation between the Ministry of Defence and members of the Public Prosecution Service, whereby the former can advise the latter on matters relating to the armed forces and regarding specific operations and matters relating to prosecutorial policy are discussed. Such advice can be of either a general or more specific nature in relation to operational circumstances or prosecutorial policy. There are no formal rules regarding how the advice must be submitted. The Public Prosecution can determine to what extent, if any, it wishes to follow any such advice.

e. What is the basis for jurisdiction over LOAC breaches under military law (territoriality, nationality, passive personality, protective jurisdiction)?

57. The bases for jurisdiction set out in the International Crimes Act (*Wet Internationale Misdrijven/WIM*) are also applicable to members of the armed forces. These have been set out in [25] above. In addition, the Military Criminal Code provides that members of the Netherlands armed forces are subject to criminal jurisdiction everywhere in the world (Art.4

MSr) This is on the basis of the “flag State” principle.

f. Who is subject to military law? Can military jurisdiction be exercised over civilians and if so under what circumstances?

58. The Military Criminal Code is primarily applicable to members of the Netherlands armed forces who are Netherlands nationals. Members of foreign armed forces are not, in principle, subject to Netherlands military law. It is, however, possible that the Netherlands Government may decide to extend its applicability to members of other armed forces. This would normally be done in accordance with agreements entered into with another State for a particular purpose and duration (Art.60a *MSr*). In addition, prisoners of war and detained persons who are entitled to be treated as prisoners of war are subject to Netherlands Military Criminal Law in the same way as members of the Netherlands armed forces (Art.65 *MSr*).

59. In addition, there are a number of situations providing for the exercise of criminal jurisdiction under the Military Criminal Code over certain categories of civilians in time of war these are:

- civilians who have been designated by the Crown as performing vital functions within the Netherlands armed forces;
- civilians outside the territory of the Kingdom of the Netherlands who make up part of the Netherlands armed forces;
- persons referred to in Article 4 A, lit.4 of the Third Geneva Convention, in so far as such persons follow the Netherlands armed forces outside the territory of the Kingdom of the Netherlands;
- persons located on territory occupied by the Netherlands armed forces in so far as the Netherlands may exercise jurisdiction over them under international law.

g. What disciplinary or punitive actions can be taken when a violation of LOAC is determined to have occurred (e.g., censure, reprimand, discharge from the military, imprisonment)?

60. The Netherlands Criminal Code (*Wetboek van Strafrecht/WvSr*) provides for a number of penalties (Art.9 *WvSr*). These include imprisonment (lifelong or temporary), custody, task penalties (work under supervision) and fines. In addition, a person may be forbidden to exercise certain rights, such as exercising active or passive electoral rights, suffer confiscation of goods, or the right to serve as a member of the armed services. The Military Criminal Code (*WMSr*) adds for persons subject to military criminal law, the primary penalty of military detention, which can take the place of imprisonment in order to keep persons who have served the nation outside of prison for as long as possible (Art.6 *MSr*). The penalty of military detention applies to sentences of up to six months. In practice this would mean that if a sentence was handed down under the International Crimes Act, that it would be served in a regular prison rather than in military detention, since the penalties under it are considerably longer than the maximum of six months for which military detention is applicable. With regard to the prohibition of serving in the armed forces, the Netherlands Criminal Code in conjunction with the Military Criminal Code make this possible for any felony of intent committed under military criminal law.

h. Describe the leadership structure of the military legal system. If there is a military Attorney General, JAG or equivalent person, what is the role of that individual? Advice to commanders? Supervision of the military legal system? Oversight of military justice? Authority within the military justice system? Relationship to military criminal and other investigators?

61. Military legal advisors within the armed forces fall under the Military Legal Service of the Armed Forces (*Militair Juridische Dienst*

Krijgsmacht/MJDK). Military legal advisors provide advice to operational commanders in all relevant areas of national and international law, including the law of armed conflict. At the operational level, they provide advice at all stages of the operation. They have no role in the investigation or prosecution of suspected criminal offences; these tasks are exclusively exercised by members of the Public Prosecution Service, which has been referred to previously. With regard to the military liaison officers assigned to the District Prosecutor in Arnhem, it should be pointed out they serve on detachment and do not form part of the Public Prosecution Service. The members of the *MJDK* do not provide legal advice relating to LOAC to the Public Prosecution Service. If it was felt necessary in the context of an investigation or in (pre trial) proceedings, the examining magistrate or court in question could summon members of the *MJDK* to provide (expert) testimony.

i. To whom does the aforementioned person report? What authority does that superior exercise over him or her?

62. The military legal advisor is directly responsible to the operational commander and is functionally directed by the military legal advisor at the next highest level in the chain of command.

j. What, if any, safeguards are in place (under law, regulation, policy or practice) regarding the independence and impartiality of the various actors in the military who might be involved in the investigation or prosecution of alleged LOAC violations? Is there any relevant case law?

63. As indicated previously in [52]-[54] above, military criminal justice has been completely integrated into the civilian criminal justice system since 1991. Although the police investigation of offences by members of the armed forces is in the hands of the Royal Military Constabulary (*KMar*) which is a branch of the armed forces, in all matters relating to

the investigation of possible criminal offences they act under the authority and at the direction of the Public Prosecution Service, which falls under the Ministry of Security and Justice and not under the Ministry of Defence and the military authorities have no role in the investigation or prosecution of criminal offences. As also stated previously (see [56] above), the military authorities can provide advice in relation to the interests of the armed forces, but this advice in no way affects the independence of the Public Prosecution Service in pursuing an investigation or determining prosecutorial policy.

64. It bears pointing out that in situations where the Royal Military Constabulary (*KMar*) carries out investigation on deployment abroad in the context of a military mission, there can be a certain degree of dependence between the *KMar* detachment and the operational commander. The *KMar* detachment will not always have access to separate communications, logistical facilities and support, and force protection and must rely on the operational commander to make these available. They might also be dependent upon military expertise in certain areas, such as mine and explosive clearance and armorers.

k. Do military investigating authorities act independently or are they subject to the direction of commanders, military legal officers, prosecutors or other actors?

65. This has been answered previously (see [52]-[56], [63]-[64] above). The investigation of criminal offences by the *KMar* is carried out under the exclusive authority and direction of the Public Prosecution Service, specifically the District Prosecutors in the Section for Military Affairs in the District of Arnhem. Military authorities and commanders do not have any authority in criminal investigation and have no authority to give directions or instructions to either the *KMar*, or the Public Prosecution Service.

l. What is the role of the commander or other senior military personnel with regard to a possible LOAC violation? Are any limitations placed on their involvement? Do they shoulder any particular responsibilities?

66. In the event a criminal offence comes to the attention of a commander, he/she is required to immediately report it officially to the *KMar* (Art.78 *WMT*). In the event a criminal investigation is initiated by the *KMar*, acting under the authority and direction of the Public Prosecution Service, the commander will be heard as a witness in order to obtain an accurate picture of the operational situation.

67. A member of the armed forces who allows a subordinate to commit a felony or who is witness to a felony offence committed by a subordinate and willfully fails to take measures in so far as these can be expected from him is punishable as an accessory to the offence (Art.148 *MSr*).

A separate criminal provision addresses the situation whereby a member of the armed forces willfully fails to take measures to prevent a felony being committed by a subordinate (Art. 149 *MSr*).

As regards the offence of “command responsibility” in relation to the crimes falling under the International Crimes Act, this has been addressed previously in [28] above.

m. Is there civilian oversight over the military system and its various actors (e.g., courts, civilian Attorney General)?

68. As indicated previously (see [1]-[3], [52]-[54], [63]-[64] above), the military justice system has been integrated into the civilian justice system.

The Military Affairs Section of the Public Prosecution Service in Arnhem is a civilian agency and forms part of the Ministry of Justice and Security.

If the Public Prosecution Service decides not to pursue a criminal investigation or bring a matter to trial, a complaint can be brought before the Appeals Court in Arnhem by a person or organization who has a direct interest. Should the Appeals Court determine that further investigation and/or prosecution is required, it can so order and the Public Prosecutor must then pursue the matter to trial (Art.12 Code of Criminal Procedure, Dutch acronym *WvSV*) See also [36]-[37] above.

APPLICATION OF THE POLICY IN PRACTICE

a. If both the military and civilian systems enjoy competence over incidents involving possible LOAC violations, what criteria are used to determine which system handles the matter? Specifically, explain the interface between civilian and military systems in the investigation and prosecution of alleged breaches of LOAC.

69. When the International Crimes Act was adopted in 2003, the Legislature chose to concentrate the adjudication of offences under this law under the jurisdiction of one District Court and the District Court in The Hague was designated as the responsible judicial forum for this purpose. There is one exception to this, and that is if the suspect(s) are members of the armed forces or persons who are subject to military law (as set out in [58]-[59] above), in which case, the Military Chamber of the District Court in Arnhem will exercise jurisdiction. In this case the status of the suspect determines the competent court. As indicated in [45] above, there is no separate military system for the handling of (inter)national offences. As regards the investigation and prosecution of international offences, the aforementioned *College van procureurs-generaal* has set out as policy that the National Prosecutorial Authority (*Landelijk Parket*, see further [1]-[3] above) is the responsible agency for offences under this law, except when a member of the armed forces is suspect. The investigation with regard to members of the armed forces is handled by the Section for Military Affairs of the District Prosecutor in Arnhem.

b. What are the reporting requirements regarding allegations of wrongdoing (e.g., are allegations reported, to what authority and in what time period)?

70. The Code of Criminal Procedure provides that any person is competent to file an official complaint; there is no time limit, except when

the complaint involves an allegation of rape or a crime of violence, in which case the complaint is mandatory and must be filed without delay. A public official is required to file a complaint relating to any offence directly related to their official function. Any person can file a complaint, unless the offence is a so-called “complaint offence” (e.g. slander/libel), in which case only the victim can file a complaint. An official complaint can be filed with any law enforcement officer, irrespective of the nature of the offence. This does not, however, signify that every complaint will automatically lead to a criminal investigation.

71. All members of the armed forces are required to report any knowledge of possible violations of the LOAC to the responsible authorities.

b. Can complaints of alleged LOAC violations be made directly to the military or civilian police?

72. Anyone filing an official complaint can do so to any law enforcement officer, whether the civilian police or the Royal Military Constabulary.

c. If there is an allegation of a LOAC violation by military personnel, what is the policy regarding investigation? Who decides whether there will be an operational inquiry (e.g., by unit military personnel) or criminal investigation?

73. See [45]-[50], [52]-[56] above.

d. Regarding such investigations, what criteria apply as to when an investigation (or other inquiry) must be launched (e.g., reasonable suspicion / belief of commission of an offence)?

74. As long as there are not sufficient grounds for a reasonable suspicion that a criminal offence has been committed, a commander is authorized

to conduct an internal investigation. Likewise, the Public Prosecution Service can initiate a factual investigation in any situation where it deems this necessary. This could be the case, for example, when an “After Action Report” indicates the necessity to obtain a fuller factual picture of a situation in the interest of ensuring a responsible evaluation of a particular incident involving the use of force. The persons involved can be heard as witnesses, but are not required to answer questions which could result in self-incrimination. Although not legally required in the context of a factual investigation, the operational commander will usually be involved in the factual investigation in order to provide a complete situational picture.

75. As soon as there are indications or sufficient information indicating a reasonable suspicion that a criminal offence has been committed, the persons involved will be treated as suspects. A commander, who is conducting an internal investigation, is then required to report his/her suspicions immediately to the Royal Military Constabulary and terminate any internal investigation being conducted. Likewise, if the Public Prosecution Service comes to the conclusion in the context of a factual investigation it is conducting that there is reasonable suspicion that a criminal offence has been committed; it will also terminate its factual investigation and proceed to determine whether a criminal investigation can be initiated. In the case of a criminal investigation, the suspect is not required to answer questions put to him/her. In case a criminal investigation is initiated, the commander must be heard as a witness in the interest of providing a full situational picture of the circumstances.

76. The *College van Procureurs Generaal* has the authority to lay down general and specific policy guidelines and directives regarding prosecutorial policy on the basis of the Law on the Organization of the Judiciary (Art. 130). Such guidelines are formulated in a policy directive and published in the Official Gazette (*Staatscourant*). With regard to international offences these include, in addition to the previously mentioned allocation of

authority to the National Prosecutorial Authority (*Landelijk Parket*), such considerations as the possible immunity under international law of the suspect, whether there is sufficient information to make out a reasonable case, and whether there is a possibility of securing a conviction within a reasonable period of time.

f. If an operational investigation or other inquiry is directed by the chain of command, is there a requirement to refer the matter for criminal investigation should it appear that a crime may have been committed? If so under what circumstances?

77. Yes, see [45]-[50], [52]-[56] above. In situations where there are (as of yet) no reasonable grounds for suspecting a criminal offence, both the commander or Ministry of Defence and the Public Prosecution Service can respectively initiate an internal or factual investigation whenever circumstances indicate this is required. The purpose of such an investigation is to obtain as full as possible picture of the facts surrounding an incident and determine whether there are grounds for suspecting criminal conduct. As stated previously, if such factual or internal investigation indicates possible criminal offence(s), it will be terminated and a criminal investigation will be initiated if the Public Prosecution Service so determines.

78. Until such time, it is possible that an internal investigation by a commander or the Ministry of Defence can occur alongside a factual investigation undertaken by the Public Prosecution Service. An example of this occurred in January 2008 in the context of a “friendly fire” incident in the Afghan province of Uruzgan. Both the Ministry of Defence and the Public Prosecution Service initiated a factual investigation and sent teams to the area. The two teams, without prejudice to their own areas of responsibility, cooperated and the results of the Ministry of Defence investigation were made available to the Public Prosecution Service, which incorporated the findings into their own report.

g. Under what circumstances must an investigation or inquiry be conducted in cases involving civilian death or injury or damage to civilian property? Is there a requirement that every death or every civilian death be investigated? Is the requirement one of law or policy? Does it extend to cases in which a military objective is attacked and collateral damage or incidental injury occurs?

79. As previously stated, any situation involving a use of force can give rise to either a criminal or a factual investigation. The former will occur if there is reasonable suspicion of a criminal offence. As regards a factual investigation in cases where there is no or not yet sufficient evidence of a criminal offence, there are no formal criteria in either legislation or the policy of the Public Prosecution Service which determine when such an investigation must be initiated. In practice the Public Prosecution Service takes into account a number of factors, such as the nature of the incident and the seriousness of the consequences that result from it. Practice indicates that such an investigation will be mounted by the Public Prosecution Service whenever civilian death or serious injury is the result of actions of the Netherlands armed forces. This practice is a matter of policy which is partly based upon the European Convention on Human Rights (ECHR). Although the *de jure* applicability of the Convention is limited outside its territorial scope (see [13]-[21] above), the Public Prosecution Service applies its provisions as a matter of policy where Netherlands armed forces are operationally deployed. The Convention prohibits the arbitrary taking of life with the exception of situations where force is used to defend another against unlawful violence (Art. 2 ECHR). This prohibition also applies in extraordinary circumstances, including armed conflict, except where force is used in conformity with the law of armed conflict (Art.5,lit.2). The case law of the European Court of Human Rights also provides that whenever force results in the taking of life, that an investigation is undertaken to ascertain whether a particular action was in conformity with the Convention (e.g. *Mc Cann et al. v United*

Kingdom Application no.18998/91, Judgment of 27 September 1995, Series A No.324,21 EHRR 97 Paras. 283-86).

80. This is the underlying motive for the Military Affairs Section of the District Prosecutor in Arnhem to require the application of the criteria contained in the Convention as a matter of policy, even where this is not legally required under its provisions and case law. This is seen as a necessary requirement to ensure accountability and a responsible approach to the use of force. In the event unintended or collateral injury results from a particular incident or that in retrospect a civilian (object) was mistaken as a military objective, this does not necessarily signify that the use of force was illegal, but all cases where deadly force is employed justify an effective and objective assessment of the factual circumstances in which it took place (See, C.A Hamers, J.J.M van Hoek & F.S. Spruijt, “*Opsporing en Vervolging in Afghanistan*” (Investigation and Prosecution in Afghanistan) in *Militair Rechtelijk Tijdschrift* (Military Law Review 2009, Issue 5, P.272) In this context, all “After Action Reports” drawn up by commanders after any contact incident takes place are made available to the Public Prosecution Service, which then can determine what further action, if any, is required.

h. What access do affected civilians, including non-citizens and residents of other countries, have to the investigation, its results and any prosecution?

81. Since January 2011, the position of victims of criminal offences has been given a separate and independent role within the context of any criminal investigation. The rights of victims have been given a basis in law rather than simply as a matter of policy as was previously the case, and they have a strengthened right to information relating to the criminal investigation, including the possibility of viewing the dossier and adding information to it which they deem relevant. In addition, Art. 12 of the Code of Criminal Procedure provides for a right of complaint by a person directly affected to a Court of Appeals in the event, the Public Prosecution Service

decides not to pursue an investigation and bring a matter to trial. (See [36]-[37] above) and this also applies to decisions relating to not investigate or prosecute members of the armed forces. This complaint procedure thereby offers a counterbalance to the prosecutorial monopoly and discretionary authority of the Public Prosecution Service to determine whether a matter should be pursued. The procedure involved is substantially similar to that in any appeals case and is open to any person, regardless of nationality or domicile, who is directly affected by a decision on the part of the Public Prosecution Service to not pursue an investigation or prosecution, for example, the relatives of victims of incidents where lethal force has been used. There is no particular time limit involved in the submission of such a complaint, other than the possibility that the offence could be no longer open to prosecution due to a Statute of Limitations relating to the offence, but that is not relevant to offences under the International Crimes Act, since no such temporal limitation applies.

82. The Netherlands has participated in a number of operations in recent years whereby force has been employed on a frequent basis, in particular in relation to participation in the Multinational Force Iraq and the International Security Assistance Force in Afghanistan, where it played the role of “lead nation” in the province of Uruzgan. This makes it quite possible, that at some point complaints procedures could be brought before the Military Chamber of the Court of Appeals for failure to prosecute or initiate criminal investigation.

82. The first such complaint was brought in 2008 as a result of a failure to prosecute in relation to a lethal incident which occurred at a checkpoint in Iraq, where Dutch troops were involved (Order of the Military Chamber, Appeals Court Arnhem, 7 April 2008). In the summer of 2009, Dutch ISAF forces were involved in intensive fighting in the Chora valley in Uruzgan, whereby dozens of civilian casualties occurred. In the course of this action, long range artillery was employed without the use of forward observation

posts as an emergency measure to avoid positions being overrun, which led the Commander of ISAF to opine that this was not in conformity with legal obligations under LOAC. This opinion was not shared by either NATO Headquarters or the Secretary General of NATO, and the Public Prosecution Service determined on the basis of an examination of the “After Action Reports” that the LOAC had not been violated, nor was there evidence of criminal violation of any other nature (Parliamentary Proceedings, Second Chamber, Session 2007-2008, 27 925, no.272, p.15-21). However, that does not necessarily signify that this matter is closed. It is quite possible that at some point in the future, a complaints procedure to the Court of Appeals could be initiated on behalf of one or more of the civilians who were affected by this incident. High political officials are also not immune from being the subject of such a complaints procedure. This was the case in 2010, when a number of ministers and members of parliament were the subject of a complaints procedure which reached the Supreme Court (*Hoge Raad*) for failure to prosecute in relation to allegations of genocide in Iraq. This complaint was declared to be inadmissible (*Hoge Raad*, 3 December 2010, LJN BO0198).

i. What role, if any, do human rights groups have in the initiation or conduct of any inquiry into alleged LOAC violations?

83. The possibility of bringing a complaint by a person who is directly affected by a decision of the Public Prosecution Service to not pursue a matter to prosecution is open to legal persons, including human rights groups, provided they can show that their objectives and activities are directly affected.

j. Please provide available statistics regarding the investigation (or other inquiries) and prosecution of alleged LOAC violations (e.g., numbers of complaints, matters investigated, charges laid, non-judicial action, trials, verdicts -- include civil and military).

84. The majority of criminal prosecutions under the International Crimes Act are related to foreign nationals who have sought residence or asylum in the Netherlands under the so called 1F procedure. Under this IF procedure, if the Immigration and Naturalization Service obtains information or has reason to believe that an applicant for residence or asylum has been involved in an international crime, they will pass this information on the National Prosecutorial Authority (*Landelijk Parket*), which will then determine whether a criminal investigation should be initiated. In addition to the 1F- Procedure, the National Prosecutorial Authority assesses any official complaints and other information (e.g. media reports) it receives to determine whether criminal investigation is warranted. The Minister of Justice and Security makes an annual report to Parliament in which the investigation and prosecution of international crimes are set out.

85. The last such report dates from 5 July 2011 and gives an overview of the situation in 2010 (see Parliamentary Proceeding, Second Chamber, Session 2010-2011,32 500 VI, no 116)

Registration and assessment of 1F–dossiers in 2010:

Total number of 1F– dossiers received by the Public Prosecution Service of which	16
Number of dossiers provisionally set aside	10
Number of dossiers dismissed	5
Number of dossiers under preliminary investigation	1
Number of dossiers not yet assessed	0

Ongoing assessment of 1 F-dossiers

Cases before the Courts	1
Cases under criminal investigation	2
Cases under preliminary investigation	35
International Legal Assistance Cases	0
Total	38

Ongoing assessment of non 1 F dossiers

Cases before the Courts	3
Cases under criminal investigation	4
Cases under preliminary investigation	22
International Legal Assistance Cases	16
Total	45

Noteworthy judicial decisions relating to violations of the LOAC are:

Supreme Court, (Jul. 8 2008) ,BC7418	Hesam case: Former Head of Afghan Military Intelligence and Deputy Minister of State Security	Conviction upheld for co-perpetration of torture and violations of LOAC
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Supreme Court, (Jul. 8 2008), BC7421	Jalazoy case: Former Head of Interrogations ,Afghan Military Intelligence	Conviction upheld for co–perpetration of torture and violations of LOAC
Court of Appeals The Hague (Jul. 16, 2009)	Faqirzada case: Former Deputy Chief Afghan Military Intelligence	Acquittal on charges of violations of LOAC and command responsibility. Currently before the Supreme Court on appeal in cassation by the Public Prosecution Service
Supreme Court, (Apr. 20, 2010)	Kouwenhoven case: Dutch national accused of supplying arms to the regime of Charles Taylor in Liberia	Acquitted by Court of Appeals The Hague, case referred back to the Appeals Court by Supreme Court ,due to lack of motivation in the verdict
Supreme Court, (Jun. 30,2009)	Van Anraat case: Dutch national accused of supplying materials for the production of mustard gas to the regime of Saddam Hussein in Iraq	Conviction upheld on charges of violations of LOAC

As regards the investigation of members of the armed forces, see [45]-[50], [87]-[97].

k. Have senior military or security service personnel or senior government officials been investigated or prosecuted for possible LOAC violations, or responsibility for such violations (e.g., by ordering, approving, tolerating, covering up violations)?

86. To date, there have been no criminal investigations of senior Dutch military or civilian officials for suspected violations of the LOAC.

l. What, if any, examples are available concerning investigations or other inquiries of alleged LOAC violations regarding the following types of incidents (indicate their outcome).

87. Until 2006, the Royal Military Constabulary investigated each incident separately in which Netherlands military personnel had utilized force in the context of conducting a mission, while on deployment abroad. In one case, this resulted in the prosecution of a member of the Royal Netherlands Marine Corps for alleged violation of his mission instructions regarding the use of force while on deployment in Iraq in 2004. The marine in question was acquitted by the Military Chamber of the Appeals Court in Arnhem. This case received considerable media attention and triggered a number of developments in the application of military criminal law in relation to operations conducted on deployment abroad as a result of policy recommendations which were formulated by an independent commission known as the Borghouts Commission.

88. Since 2006, this procedure has been altered and the oversight by the Public Prosecution Service of Netherlands military personnel on deployment regarding the use of force is done through inspection by the Royal Military Constabulary (*Kmar*) (acting under the authority and

instructions of the Public Prosecution Service) of the “After Action Reports”, which are submitted after each contact incident or use of force (see [45]-[50], [74]-[76] above). During the deployment of the Netherlands armed forces as lead nation in the province of Uruzgan in the period 2006-2010, some 1500 such “After Action Reports” were submitted for inspection under this new procedure. The use of force described in these reports varied from the discharge of warning shots, through the calling in of air and fire support, up to full scale engagements lasting several days at time in which all available assets were utilized. The Minister of Defence informed Parliament that a number of incidents gave cause to conduct a factual investigation to obtain a full picture of whether force had been used in conformity with legal standards and policy guidelines. In no case did the incidents reported or investigated give rise to a suspicion of a criminal offence. In one case, a commander had reported the possible violation of mission instructions regarding the use of force by one of his subordinates; however, after further (criminal) investigation, it was decided not to prosecute the incident (See answer of the Minister of Defence to questions put in the First Chamber of Parliament (29 April 2010) with registration BS2011012259, relating to the Final Report of the Borghouts Commission, dated 21 October 2010).

1. Theft/assault or alleged mistreatment of civilians (not taking a direct part in hostilities);

89. NA

2. Mistreatment of detainees including during interrogation;

90. Following a newspaper report in 2006, in which allegations were made that Iraqi prisoners had been subjected to torture by members of the Military Intelligence Service, the Minister of Defence initiated a factual investigation by an independent commission. The Oversight Committee for the Intelligence Services also conducted an investigation and both their

reports were submitted to the Public Prosecution Service to determine whether further investigation was warranted. After extensive factual investigation, the Public Prosecution Service determined that there were no grounds for suspecting criminal offences had been committed. (See Report of the van den Berg Commission regarding interrogation techniques in Iraq, 18 June 2007).

3. *Use of force while assisting in the maintenance of law and order (either directly or in support of police forces) in occupied territories;*

91. NA

4. *Use of force while seeking to arrest or detain a civilian taking a direct part in hostilities;*

92. NA

5. *Use of force at a checkpoint or during a similar operation;*

93. One such incident occurred in the context of a complaints procedure to the Appeals Court in Arnhem regarding the decision of the Public Prosecution Service to not pursue an incident involving a shooting incident at a checkpoint in Iraq, whereby a member of the Netherlands was involved in 2004. The Court of Appeals upheld the decision of the Public Prosecution Service to abstain from prosecution on the basis of the determination that the soldier in question reasonably concluded he was under fire and reacted within the parameters of self-defense. (See Court of Appeals Arnhem Decision of 7 April 2008 reproduced in the Military Law Review (*Militair Rechtelijk Tijdschrift*) 2008, p. 215 *et seq.*)

6. *The targeting of civilians taking a direct part in hostilities;*

94. N.A.

7. *Use of force against a member of an organized armed group or terrorist organization in the context of an armed conflict;*

95. N.A.

8. *Use of force against enemy which resulted in collateral civilian casualties;*

96. Three examples are noteworthy:

The first example concerns the heavy fighting in the Chora Valley in Uruzgan in July 2007 whereby dozens of civilian casualties resulted. On the basis of various factual investigations, the Public Prosecution Service determined that there were no grounds for suspecting violations of the LOAC (see [82] above).

The second example concerns a factual investigation undertaken by the Public Prosecution Service after reports that Netherlands Air Force Apache helicopters had caused civilian casualties when firing upon two suspect vehicles in the Chenartu District in Uruzgan in June 2009. The Public Prosecution Service determined that the Apache pilots had acted within the law.

The third example concerns a factual investigation which was conducted in connection with the deployment of a Netherlands Air Force F16 in the Province of Helmand in 2009 whereby a number of civilians, including children, were killed. On the basis of the investigation, the Public Prosecution Service determined that the F16 pilot had not committed a criminal offence.

9. *Any other relevant case.*

97. Several other incidents should be addressed:

- A complaint which was deemed inadmissible in connection with the decision of the Public Prosecution Service to not prosecute members of the government for alleged participation in genocide in Iraq (Supreme Court 3 December 2010, LJN BO0198)
 - The official complaint filed in July 2010 against the commander, deputy commander and senior NCO of the Dutch battalion at Srebrenica for complicity in genocide and violation of the LOAC. The Public Prosecution Service initiated a factual investigation in connection with this complaint which is still underway.
 - In 2009 an organization under the name “Commission for Investigation of Western War Crimes” initiated a complaints procedure before the Appeals Court in Arnhem against the decision of the Public Prosecution Service to not prosecute a number of top officials within the Ministry of Defence and the armed forces for alleged war crimes in Afghanistan. The complaint was deemed inadmissible due to lack of standing of the organization. (Appeals Court The Hague, Order no K08/0093, March 2009).
- *Is there any other information which you would like to bring to the attention of the Commission?*

98. One matter which deserves further mention is the legal instruction of the members of the Legal Service of the Armed Forces (*Militair Juridische Dienst Krijgsmacht*). This service is made up of some 130 military lawyers from all branches of the armed forces who have inter alia, the task of instructing members of the armed forces in the international law of armed

conflict and providing legal advice to commanders, including legal advice on matters relating to the law of armed conflict when on operational deployment as is laid down in Article 82 of the First Additional Protocol 1977 to the Geneva Conventions, to which the Netherlands is party. In order to ensure adequate legal knowledge of the relevant areas of law, all members must follow instruction at postgraduate university level in the relevant areas of national and international law, in addition to having obtained their degree in law at a Dutch university. This instruction is provided at the Faculty of Law of the University of Amsterdam through a specialized programme in military law, which includes courses in military criminal and disciplinary law, military administrative law, constitutional law in relation to the armed forces, international humanitarian law, international criminal law and the international law of military operations. Obtaining this certificate of completion of this specialized programme is a requirement under the service regulations of the Legal Service of the Armed Forces, for acting in the capacity as military legal advisor. Both of the authors of the answers to this questionnaire are members of faculty at the University of Amsterdam acting as instructors in this specialized programme, respectively as Professor of Military Law and Adjunct Assistant Professor in Military Criminal Law.